UNIVERSITY OF PITTSBURGH

Darlington Memorial Library

Reports of Cases,

BEFORE THE

REVOLUTION.

REPORTS

OF

CASES

RULED AND ADJUDGED IN

THE

Courts of Pennsylvania,

BEFORE AND SINCE

THE

REVOLUTION.

BY A. J. DALLAS.

VOL. I.

THE SECOND EDITION,

WITH ADDITIONAL NOTES, REFERENCES, AND AUTHORITIES.

Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt, et olim non defuerunt, qui *hanc juris partem* ita contemnerent, quasi nihil ejus præter inane nomen existeret.

GROTIUS.

PHILADELPHIA:

PRINTED FOR P. BYRNE, NO. 182, MARKET STREET.

1806.

WE all knowing the learning, integrity, and abilities of Alexander James Dallas, *Esquire, Counsellor at Law, do, for the common good, approve and recommend the printing and publishing his book, entitled,* "Reports of Cases ruled and adjudged in the Courts of PENNSYLVANIA, before and since the Revolution."

THOMAS M'KEAN.
WILLIAM A. ATLEE.
JACOB RUSH.
GEORGE BRYAN.
EDWARD SHIPPEN.

PHILADELPHIA, 29th April, 1790.

MEMORANDUM.

The Copy-right secured according to Law.

TO THE HONOURABLE

THOMAS M'KEAN, ESQUIRE, L.L.D.

CHIEF JUSTICE OF THE STATE OF PENNSYLVANIA,

&c. &c.

SIR,

IN addressing this volume to you, the public will readily acknowledge the justice and propriety of the tribute; since a work of this nature is only to be esteemed, like a mirror, for the truth and accuracy with which its object is reflected; and I do nothing more on the occasion, than present you with your own portrait, in which all the praise I covet, or deserve, is that of having preserved some resemblance to the original.

But, independent of this consideration, the opportunity of making the present offering, yields a high gratification to my feelings and my pride. By the uniform courtesy and cordiality of your attentions, I have naturally been inspired with sentiments of esteem and attachment; and, it would betray great insensibility, were I not aware of the advantage of delivering these Reports to the world, under the sanction of your avowed approbation and patronage. Hence, Sir, I consider the enjoy-

ment of your good opinion as an honourable source of self-gratulation, and the testimony of your judgment as a sure recommendation to the public.

Were I here inclined to pursue the beaten track of dedications, permit me, Sir, to observe, that an occasion, or a subject, more favourable, seldom can occur. It is my intention, however, that this address should be viewed, not as the eulogy of a patron, but as an instrument of thanks, and a token of regard: For, History, which may applaud without the suspicion of flattery, must hereafter do justice to your merits; but it is by this opportunity alone, that I could enjoy the satisfaction of publicly declaring the respect and esteem, with which

I am, Sir,

Your obliged and

Most obedient Servant,

A. J. Dallas.

Philadelphia, 1*st May*, 1790.

PREFACE.

OF the reasons which induced me to undertake this work, and of the difficulties that have attended its execution, it will be enough, at this time, to observe, that the former originated in the wish of some friends, whom I was desirous to oblige; and that the latter would hardly have been surmounted, without the liberal assistance of the Bench and the Bar, which I shall ever be proud to acknowledge.

Perhaps, indeed, there never was a book, for the faults of which the publisher is so entirely subject to censure, and yet so little entitled to praise for its merits. The opinions of the respective Courts, upon many of the most important points, THE CHIEF JUSTICE, and Mr. PRESIDENT SHIPPEN, obligingly permitted me to transcribe from their notes; several of the decisions, previous to the year 1787, were kindly furnished by Mr. *Rawle;* the briefs of the different Council were, on every application, freely communicated; and each case, before it was sent to the press, underwent the examination of the presiding Judge of the Court in which it was determined. Besides these advantages, with respect to the materials of this compilation, I have remarked a candid disposition among the members of the profession, to excuse any defects or inaccuracies that may appear, in the mere style and mode of publication: And, therefore, I anticipate with pleasure, that, as a consequence of such encouragement and indulgence, some one, more able, will be tempted to follow my example, and render an essential service to his country, by preserving the principles on which the future judgments of our Courts are founded;—a matter, that, in every point of view, whether we consider the present political situation of the Union, the improvements in the judicial system under the Constitution

proposed for this State, the advancement of agriculture, or the extension of commerce, must daily become more interesting and important to the liberty, peace, and property of every citizen.

The work now submitted to public scrutiny must, at least, serve to facilitate the labours of the student, by apprising him of those points of law which have already been discussed and decided: Nor will it be without its use in furnishing some hints for regulating the conduct of Referees, to whom, according to the present practice, a very great share of the administration of justice is entrusted. But, I confess, that my hopes will not be completely gratified, unless these Reports, likewise, tend to shew the pure and uniform system of jurisprudence that prevails in PENNSYLVANIA; of which, however, the best evidence is her flourishing condition at home, and her respectable character abroad.

If the reception of this volume justifies me, it is possible that I should hereafter be induced to undertake the publication of another; for which sufficient materials are already in my possession. But I have so much occasion to bespeak candour for what I have done, that I shall not be surprised, if it is deemed dangerous and impolitic, thus to extend the view of the public to what I may do.

A. J. DALLAS.

PHILADELPHIA, 1st May, 1790.

A TABLE,

OF THE

NAMES OF THE CASES COMPRISED IN THIS VOLUME.

A.

ABBOT *v.* Pinchin, 349
Adams *v.* La Combe, 440
Alberson's, Lessee, *v.* Robeson, 9
Anonymous, 1, 11, 20
Ashton's Lessee, *v.* Ashton, 4

B.

Barnard *v.* Field, 348
Barnet Lazarus's Case, 152
Belt *v.* Dalby, 167
Bethel *v.* Lloyd, *et al.* 2
Biddle's Lessee, *v.* Shippen, 19
Bœhm, *et al. v.* Engle, 15
Bolton *v.* Martin, 295
Buckley *v.* Durant, 129
Bunner *v.* Neil, 457
Burke's Lessee *v.* Ryan 94
Burrows *v.* Heisham, 133
Butcher *v.* Coats, 340
Busby *v.* Busby, 226
Brown *v.* Scott, *et al.* 145
——— *v.* Sutter, 239
——— *v.* Edgar, 311

C.

Caldwell *v.* Barclay, *et al. in not.* 305
Calvert *v.* Pitt, 406
Camp *v.* Lockwood, 393
Campbell *v.* Richardson, 131
Carlisle, *et ux. v.* Cuningham, 81
Carrew *v.* Willing, 130
Case *v.* Hufty, 154
Chaplin *v.* Kirwan, 187
Chapman *v.* Steinmetz, 261
Cooper *v.* Coats, 248
——— *v.* ——— 308
Cummings *v.* Linn, 444

D.

Davey, *et ux. v.* Turner, 11
Davison's Lessee, *v.* Bloomer, 123
De Haven *v.* Henderson, 424
Doane's Admor. *v.* Penhallow, 218
Dorrow *v.* Kelly, 142
Dutilh *v.* Ritchie, 171
D'Utricht *v.* Melchor, 428

E.

Eastwick *v.* Hugg, 222
Elliot *v.* Elliot, 379

F

Fallowfield *v.* Marlborough, 28

Farrel *v.* M'Clea, 392
Finlay *v.* Knox, *et al.* 158
Fothergill's Lessee *v.* Stover, 6
Gerard *v.* Basse, *et al.* 119
——— *v.* La Coste, *et al.* 194
Geyer *v.* Smith, 347
Geyger *v.* Stoy, 135
Gibbs *v.* Gibbs, 371
Gilpin *v.* Semple, 251
Gorgerat *v.* M'Carty, 368
Graaff *v.* Smith's Admors. 481
Græme *v.* Harris, 456
Graham's Appeal, 136
Gregory's Lessee *v.* Setter, 193
Grier, *et al. v.* Grier, 173
Guthrie *v.* White, 268

H.

Hagner *v.* Musgrove, 83
Halhead *v.* Ross, *et al.* 405
Hamilton's Lessee *v.* Galloway, 93
Hamilton's Exors. *v.* Callander's Exors. 420
Hart *v.* James, 355
Henderson *v.* Allen, 149
Henry, Exor. *v.* Risk, *et al.* 265
Hewes, *et al. v.* M'Dowel, 5
——— *v.* ——— *ib.*
Hight *v.* Wilson, 94
Hocker *v.* Stricker, 225
Hollingsworth *v.* Hamlin, 151
——— *v.* Leiper, 161
——— *v.* Ogle, 257
Holmes *v.* Comegys, 439
Hooton *v.* Will, 187
——— *v.* ———, 450
Hudson *v.* Howell, 310
Hunter's Lessee *v.* Kennedy, 81
Hurst *v.* Dippo, 20
Hyam's *Lessee v.* Edwards, 1
——— *v.* ———, *ib.*

I.

Jackson *v.* Mason, 135
——— *v.* Keely, 135
——— *et al. v.* Young, 248
Jacobs's Claim, 52
James's Claim, 47
James, *et al. v.* Allen, 188
James, *et al. v.* Young, 248
James *v.* Brown, 339
January *v.* Goodman, 208
Ingles *v.* Bringhurst, 341
Innes *v.* Miller, 188
Johnson *v.* Hocker, 406

K.

Kelly *v.* Ord, *et al.* 310
Kennedy *v.* Fury, 72
——— *v.* Nedrow, *et ux.* 415
Kepple *v.* Williams, 29
Kerlins's Lessee *v.* Bull, 175
Kirkbride, *et al. v.* Durden, 288
Kunckle *et al. v.* Baker, 169
Kunckle *v.* Wynick, 305
——— *v.* Kunckle, 364
Kuhn *v.* Primer, 225

L.

Lee *v.* Biddis, 175
Leib *v.* Bolton, 82
Lloyd *v.* Taylor, 17
Lesher *v.* Gehr, 330
Levinz *v.* Will, 430
Lewis *v.* Maris, 278
Lyle *v.* Foreman, 480
Lynch *v.* Wood, 310

M.

Mariot, *et ux. v.* Davey, *et al.* 164
M'Carty *v.* Nixon, 78
M'Clenachan *v.* M'Carty, 375
M'Cullough *v.* Houston, 444
M'Cullum *v.* Coxe, 139
M'Dill's Lessee *v.* M'Dill, 63
M'Kegg *v.* Crawford, 347
M'Veaugh *v.* Goods, 62

Mifflin *v.* Gasqui, 142
Mifflin, *et al v.* Bingham, 272
Millar *v.* Hall, 229
Montgomery *v.* Henry, *et al.* 50
Moore's Lessee *v.* Few, *et al.* 170
Morgan *v.* Echart, *et al.* 295
——— *v.* Bower, *ib.*
Morris's Lessee *v.* Vanderen, 64
Morris *v.* De Mars, 140
——— *v.* Tarin, 147
——— *v.* Foreman, 193
Murdock *v.* Will, 341
Musgrove, *qui tam v.* Gibbs, 216

N.

Nathan *v.* Virginia, *in not.* 77
Newman *v.* Bradley, 240
Nixon, *et al. v.* Long, *et al.* 6

O.

Ogden *v.* Ash, 162
O'Neil *v.* Chew, 379
Oxley *v.* Coperthwaite, 349
Oxley, *et al. v.* Oldden, 430

P.

Parker *v.* Wood, 436
Patton *v.* Caldwell, 419
Penman, *et al. v.* Wayne, 241
——— *v.* ———, 348
Penrose *v.* Hart, 378
Phelps, *et al. v.* Holker, 261
Phile, *qui tam. v.* Ship Anna, 197
Phillips *v.* Hyde, 439
Pinchin *v.* Fry, 405
Pleasants *v.* Meng, *et al.* 380
Plowman *v.* Abrams, 316
Pollard *v.* Shaffer, 210
Poultney, *et al. v.* Ross, 238
Price *v.* Watkins, 8
Primer *v.* Kuhn, 452
Proprietary's Lessee *v.* Ralston, 18
Purveyance, *et al. v.* Angus, 180

Q.

Quessnel *v.* Mussi, 436
——— *v.* ——— 449

R.

Rapelje *v.* Emory, 349
Rapp *v.* Le Blanc, *et al.* 63
Respublica *v.* Sweers, 41
——— *v.* Powell, 47
——— *v.* Melder, *et al.* 33
——— *v.* Malin, *ib.*
——— *v.* Carlisle, 35
——— *v.* Roberts, 39
——— *v.* Chapman, 53
——— *v.* Buffington, 61
——— *v.* Schriber, *et al.* 68
——— *v.* ——— *ib.*
——— *v.* Mesca, *et al.* 73
——— *v.* Doan, 86
——— *v.* Keating, 110
——— *v.* De Longchamps, 111
——— *v.* Caldwell, 150
——— *v.* Gordon, 233
——— *v.* Shaffer, 236
——— *v.* Oswald, 319
——— *v.* Fischer, 335
——— *v.* Campell, 354
——— *v.* Sparhawk, 357
——— *v.* Negro Betsey,
Rex *v.* Lukens, 5
——— *v.* Rapp, 9
——— *v.* Haas, *et al.* *ib.*
Richardson's Lessee, *v.* Campbell, 10
Riche, *et al. v.* Broadfield, 16
Rechette *v.* Stewart, *et al.* 317
Rivers *v.* Walker, 81
Robbins *v.* Whitman, 410
Robertson, *et al. v.* Vogle, 252
Rodman *et al. v.* Hoops, 85
Ross *v.* Clarke, 354

S.

Schlosser v. Lesher, 411
——— v. ——— 251
Scotten v. Stanley, 129
Shewell v. Wycoff, 312
Shippen's Lessee v. Bush, 251
Shoemaker v. Shirtliffe, 127
——— v. ———, 133
——— v. Knorr, 197
Shotwell v. Bœhm, 172
Shrider's Lessee, v. Nargen, 68
Sliver v. Shelback, 165
Smith v. Davids, 410
Snowden v. Hemmings, 83
Somers v. Balabrega, 164
Sterret's Case, 356
Steele v. Steele, 409
Steiner v. Fell, *et al.* 21
Steinmetz *et al.* v. Curry, 234
——— v. ———, 270
Stevenson v. Pemberton. 3
Story, *et al.* v. Strettel, 10
Stotesbury v. Covenhoven, 164
Strickland's Lessee, v. Poole, 14
Swift v. Hawkins, *et al.* 17

T.

Talbot, *qui tam*, v. the Commanders and Owners of three Brigs, 95
Taylor v. Knox, *et al.* 158
Tetter v. Rapesnyder, 293
Thomas v. Horlocker, 14
Thompson v. Young, 294
Thompson's Lessee, v. White, 424
Thompson v. Musser, 458
Tillier v. Whitehead, 269
Tracey v. Wycoff, 124

V.

Vanhorne's Lessee, v. Harrison, 137
Vienne v. M'Carty, 154

W.

Wallace v. Childs, *et al.* 7
——— v. Fitzsimons, 248
Walton v. Willis, 265
——— v. ———, 351
Waters v. Millar, 369
Weaver v. Lawrence, 156
——— v. ———, 379
Wells, *et al.* v. Fox, 308
Weston, *et ux.* v. Stammers, 2
——— v. ———, *ib.*
——— v. ———, *ib.*
——— v. ———, *ib.*
Wharton, *et al.* v. Morris, *et al.* 125
Wheeler v. Hughes, 23
Whiteside v. Oakman, 293
Wilcox, *et al.* v. Henry, 69
Williams v. Geheogan, 267
——— v. Craig, 313
Wilson's Lessee, v. Campbell, 126
Woods v. Courter, *et al.* 141

Y.

Young v. Reuben, 119

Z.

Zane's Ex'ors, v. Cowperthwaite, 312
Zantinger v. Pole, 419

N. B. *The references to the acts of Assembly are made, by styling the volume usually called "Province Laws" 1 State Laws; and so on, 2d, 3d, and 4th, State Laws."*

Supreme Court of Pennsylvania:

September Term, 1754.

Before WILLIAM ALLEN, Chief Justice.
LAWRENCE GROWDEN, and CALEB COWPLAND, } Justices.

ANONYMOUS.

ADJUDGED by the Court, that the statute of frauds and perjuries* does not extend to this province, though made before Mr. *Penn*'s charter: the Governor of *New York* having exercised a jurisdiction here, before the making that statute, by virtue of the word *territories*, in the grant to the Duke of *York*, of *New York* and *New Jersey*.

April Term, 1759.

WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, Justice.

The Lessee of HYAM and Others *v.* EDWARDS.

COPY of a deed inrolled in the King's Bench in *England*, proved before the Lord Mayor of *London* to be a true one; allowed to be given in evidence to a Jury to support a title to lands in this province.†

* 29 *Car.* 2. c. 3. This statute was supplied, however, by an act of General Assembly passed the 12 *Geo.* 3. c. 31. 1 *State Laws* 462. and see 2 *P. Will.* 75.
† 11 *Mod.* 2. c. 2.

1759.

SAME CAUSE.

COPY of the register of births and deaths of people called Quakers in *England*, proved to be a true one before the Lord Mayor of *London*, allowed to be given in evidence to prove the death of a person.

BETHEL *v.* LLOYD and Others.

PARTITION.—Plea *non tenet insimul*, &c. Defendants permitted to give in evidence to the Jury, that some of them were not tenants of the freehold* but only tenants at will.

The Lessee of LEWIS and MARY WESTON *v.* THOMAS STAMMERS.

AN exemplification of a will, made in *England*, and certified *generally* to have been proved, approved and registered, in the year 1704, in the Prerogative Court of *Canterbury*, under the seal of the said Prerogative Court, allowed, on debate, to be read in evidence to the Jury.

SAME CAUSE.

MINUTES of the Commissioners of property allowed to be given in evidence.

SAME CAUSE.

DEPOSITIONS taken in a former cause by rule of Court with consent of parties (in an inferior Court) in which the present Defendant was a party, and where the present title (it was said) came in question, upon debate, were ruled by the Court to be no evidence in this cause: *Note*. It did not appear that those depositions were read in evidence on the former trial.

* *Cro. El. 759. Litt. Rep.*

1760.

April Term, 1760.

WILLIAM ALLEN, Chief Justice.
LAWRENCE GROWDEN, } Justices.
WILLIAM COLEMAN, }

STEVENSON *v.* PEMBERTON.

SCIRE *facias* against Defendant as garnishee. The case was; C. in the *West-Indies* was indebted to P. the Defendant, for bills of exchange drawn by C. in favour of P. which were protested. P. by letter solicits C. for security. C. consigns a quantity of rum to P. and by letter directs P. to sell the same for his (C.'s) account, and apply the proceeds to the payment of some protested bills drawn by C. in favour of other people, "*first being satisfied that his (P.'s) bills were paid.*"—The bills of lading express this rum to be shipt on the proper account and risque of C.—The rum comes into P.'s hands, *but before any sale*, the Plaintiff S. a creditor of C. brought a foreign attachment against C. and attached these goods in the hands of P.—The question on these facts, as found by a special verdict, was, Whether P. should retain the goods for the payment of his own debt, or whether the property remained in C. so as to be liable to the attachment of S.?

It was urged by the council for the Plaintiff, that the consignment of this rum to P. on the account of C. with orders to sell the same *on the account of C.* and then to apply the proceeds according to his directions, did not alter the property, but left the same in C. till a sale. And that P. was only to have a future interest in the *money* arising from the sale of the goods.—But the Plaintiff being as well a creditor as the Defendant, and coming in under the law of attachments *before a sale* and while the property, by the very terms of the consignment, remained in C. ought to be first paid his debt. The council cited *Bro. Property* 2. 2 *Mod.* 242. 2 *Chan. Cases* 7. 36. 1 *Salk.* 160. 12 *Mod.* 156.

For the Defendant: It was contended, that the rum was a security in the hands of P. for the payment of P.'s debt, and that P. was a trustee for himself and the other *Dutch* bill creditors. And that such a special property was vested in P. that C. himself could have no remedy to get these goods out of the hands of P. till P.'s debt was satisfied; and that the Plaintiff could be in no better case than C. himself.—The cases cited for the Defendant were 2 *Vern.* 428. 2 *Thomas Jones* 222. 2 *Peere Williams* 326. *Bro. Act. sur Case* 113. 271. *Finch* 299. 236. 10 *Mod.* 432. *Yelv.* 164. 2 *Leon* 30. 10 *Mod.* 144. 2 *Co.* 26. 1 *Stra.* 165.*

* See *Cowp.* 125. *et ant.*

1760. BY THE COURT. This rum appears to have been sent to satisfy P.'s debt. If it had been money, there could have been no doubt but the Defendant would have retained it. And the only difference is that a commodity was sent which must be converted into money, before the sum to be paid to P. could be ascertained, but, as to P.'s interest in it, the case was the same. Therefore judgment, by the whole Court, was given for the Defendant.

Chew and *Moland pro.* Quer.—*Galloway* and *Dickenson pro* Def.

The Lessee of ASHTON *v.* ASHTON.

Present LAWRENCE GROWDEN, WILLIAM COLEMAN, } Justices.

ON special verdict. Devise to the *first heir male* of I. S. *when* he shall arrive to the age of 21 years, he *paying* to A. and B. the daughters of I. S. £. 40 each.—*After devisor's death* I. S. had a son, who attained the age of 21 years, and paid his sisters the £. 40 each.

The question was, whether the son of I. S. could take by executory devise?—It was objected for the Defendant, 1st. That this being a present devise it could not take effect because to a person not *in esse*. 2d. That though it might be construed a future devise, yet it was too remote; for an executory devise must take effect within the compass of a life or lives *in esse*, or at farthest within nine months after: And in this case I. S. might have had no son but a daughter, who might have had a daughter, who might have had a son, who would have been the *first heir male* of I. S. which would have been too remote a contingency, and would have tended to a perpetuity. And the case must be considered as at the time of making the devise, that is, how it might be; and not how it has actually happened. 3d. That the son of I. S. could not take, because the limitation was to the *first heir male* and *nemo est hæres fiventis*.

For the Plaintiff it was answered: 1st. That this was no present devise, the testator taking notice that I. S. had no son born by the word *first* heir male, and using the words *when* and *paying*. 2d. That this contingency was not too remote, because the testator by the words *first heir male*, must have meant *first son;* and that such a construction must be made as to carry the intent of the testator into execution. 3d. *First heir male* are words of purchase and *designatio personæ*, and the law will supply the words *of the body* in a will.

BY THE COURT. The intent of the testator is clear, that the first *son* of I. S. should take. Therefore judgment BY THE COURT.

Cases cited; 1 Lord *Raym.* 207. 1 *Salk* 229. *Talbot*'s *Cases* 44. 50. 145. 1 *Vern.* 729 *Vin. Dev.* 315. 2 *Vent.* 311. 1 *Peer. Williams* 229. 3 *Co.* 20. 2 *Peer. Williams* 196. 2 *Salk* 621.

Chew pro Quer. *Moland* and *Dickenson pro* Def.*

* See 12 *Mod.* 279. 287. 1 *Inst.* 24.

April Term, 1762.

1762.

Present WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, Justice.

The Lessee of JOSEPH and JAMES HEWES *v.* ANDREW M'DOWELL.

ON a question, whether the original private book of memorandums of the secretary of the Land Office, respecting the description of the land originally applied for, should be given in evidence, it was urged that this book, containing the original entries from which the minutes of property are formed, is the best evidence and therefore ought to be admitted. THE COURT said it was a matter of consequence; and recommended it to the council of the other side to consent to the book's being given in evidence; which was accordingly done, and no determination given by the Court.

SAME CAUSE.

THE Court said, that the copy of a warrant of survey under the Surveyor General's hand, and containing his direction to the Deputy Surveyor to make the survey, has always been given in evidence:—And such a copy was now ruled to be admitted, and was read to the jury.

THE KING *v.* JOHN LUKENS.

INDICTMENT for a nuisance.—Mr. *Dickenson*, for the Defendant, moved that a prosecutor should be indorsed on the indictment, agreeably to the act of assembly, * before the Defendant should be put to plead.—Mr. *Chew*, Attorney General, urged that such a construction ought to be put on the act as that public justice may not be eluded; and that there should be no necessity to indorse a prosecutor, unless it be proved that there is some person active in carrying on a prosecution; because, if it took its rise from the Grand Jury, or a Justice of the Peace, no person could be indorsed; and offenders of the highest nature would escape being brought to justice.

BY THE COURT. It often happens that all the witnesses necessary to support a public prosecution are brought unwillingly to give evidence; and the act could never intend there should be a

* 4 *Ann.* c. 37. see 1 *State Laws* 49.

1762. prosecutor indorsed, unless there was really a prosecutor existing, for the words in the act are, *the prosecutor*. And as no person in the present case is proved to be active in carrying on the prosecution, the Defendant must plead to the indictment without any indorsement.

It was then moved, that the Defendant himself might be sworn to prove the person prosecuting; but denied by the Court, who said it must be proved by indifferent witnesses.

September Term, 1762.

NIXON and HARPER *v.* LONG and PLUMSTEAD.

THE protest of a master of a ship, allowed to be given in evidence.

April Term, 1763.

WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, Justice.

The Lessee of FOTHERGILL and Others *v.* CHRISTIAN STOVER.

A LETTER from *James Steel*, Receiver General and Secretary of the Land Office, to the Surveyor General's Deputy in *Chester* county, in these words—"Friend *Isaac Taylor*, *Phi*-"*ladelphia*, 3d 2d m 1719.—*James Logan* has agreed that the "bearer hereof, *William Willis*, shall have 500 acres of land at "*Conestogoe*. Please to survey it to him and the warrant shall be "ready.—Thy loving friend, *James Steel*," offered to be given

evidence as the foundation of the Defendant's title. Objected, on the part of the Plaintiff, that *James Steel* by his order only, without a warrant from the proprietors or the commissioners of property, could not authorise the location of lands: And even supposing it to amount to an order from *James Logan* himself, as he was only one of *three* commissioners, such order cannot be a sufficient warrant. 1763.

But the Court said, that under these sort of orders from the proprietor's officers, a great part of the province had been settled, and that for the general conveniency they had been heretofore allowed to be given in evidence, and particularly in *M'Dowell*'s case. In that case, last *April* Term, a letter from *Richard Peters*, Secretary of the Land Office, to the same effect as the above, was allowed; and the letter in this case was accordingly ruled to be given in evidence.

A plot of a survey made in pursuance of the above letter, in *Isaac Taylor*'s own hand writing, with a note at the bottom thus, "sur. 9ber 10. 1720," and in the body of it, the words "*William Willis*, 400 acres," not returned into the Surveyor General's or Secretary's Office, but found among *Isaac Taylor*'s land papers, many years after his death, was allowed to be given in evidence, against a regular warrant and survey posterior to the above; a settlement and possession being proved to have been made, the first survey amounting to an impropriation, and the Land Office appearing to have been shut between the years 1718 and 1732.

N. B. On an appeal to the King and Council, the judgment of the Supreme Court was affirmed.*

THOMAS WALLACE *v.* CHILD and STYLES.

SUIT on a policy of insurance. It was set forth in the declaration that the vessel sprung a leak at sea, and put into *Providence*, through necessity.—The *master of the ship* was produced by the Plaintiff as a witness to prove the bill of lading, and to give a general account of the transactions on board the vessel and at *Providence*. His admission was opposed, because the captain himself had goods on board which were insured, and the money was refused to be paid by the underwriters on his policy till this suit was determined, and therefore he was interested.—But it was answered, that the master of the ship was the only person who can be supposed capable of giving a full account of the matter: and part of the defence in this case being, that the goods insured were innumerated commodities and therefore not lawful to be shipt from *Carolina* to *Madeira;* and the captain's goods insured, were not to be landed at *Madeira*, but at *London*, therefore the captain's insurance could not be affected by any determination in this case.

The Court ruled, that he should be examined on the *Voire dire*, and if he said he was disinterested, he should be sworn in chief; which was done, and he was admitted a witness.

* See 2 *Dall. Rep.* 98. 3 *Dall. Rep.* 425.

1763.

PRICE v. WATKINS.

SPECIAL verdict. The question arose on these words of a will.—"*Item*—My will is that *after my wife Ruth Price*'s *de-* "*cease*, or if she shall alter her condition and marry, then in such "case I devise and bequeath unto my loving friends I. W. and "M. K. or to any one of them, in case the other should die, in "trust and for the intent to sell and convey all that messuage &c. "to any person or persons that shall purchase the same, and the "money arising from the sale of the premises shall be divided "between my children herein after named, when they attain se- "verally to the age of 21 years or be married, which shall first "happen." *Samuel Price* one of the children attained the age of 21 years and married, and afterwards died intestate and without issue, *in the life time of the testator's widow Ruth Price*, who did never marry again. Then the widow died, and after her death the trustees sold, and the administratrix of *Samuel* brings this suit for *Samuel*'s proportionable part of the money arising from the sale of the house. And the question was, whether this was a vested legacy to *Samuel*, or whether it was lapsed by his dying before the trustees had power to sell, to wit, in the life time of the testator's widow?

For the Plaintiff it was urged, that land ordered to be sold and converted into money, was to be considered as personal estate. That this land was to be sold at all events, so there was no contingency. That both events to make a vesting in *Samuel* had happened, to wit, attaining the age of 21 and marrying; and that this case was exactly similar to the case of *King* v. *Wilkes*. *Talbot*'s *Cases* 117. Besides which many other cases were cited for the Plaintiff, viz. 2 *Vern.* 536. 1 *Peer. Williams* 109. 2 *Peer. Williams* 320. 2 *Ab. Ca. Eq.* 548. 2 *Vent.* 347. 2 *Vern.* 758. 766. 4 *Bac. Ab.* 308. 2 *Vent.* 366. 2 *Vern.* 72. 348. 424. 2 *Ab. Ca. Eq.* 654.

For the Defendant it was said, that in legacies to be raised out of land, the time of *payment* is the time of *vesting*. That in this case the land could not be considered as personal estate, till the trustees had power to sell it, which was not till after the widow's death, and that *Samuel* dying before, his legacy was lapsed and would merge for the benefit of the heirs. And the case of *Oads* and *Ferry* was much relied on, *Vin. Devise* 383. The other cases cited for the Defendant were 2d *Vern.* 92. 416. 208. 2 *Peere Williams* 276. 610. 484. 3 *Peere Williams* 20.

BUT THE COURT were clearly of opinion, that it was a *vested* legacy, and judgment was given for the Plaintiff.

1764.

April Term, 1764.

Present WILLIAM COLEMAN, ALEXANDER STEDMAN, } Justices.

The Lessee of ALBERTSON *v.* ROBESON.

MOVED to admit a witness to prove the age of the Plaintiff, his brother, (about sixty years old) from the hearsay of their father and mother. Opposed, and refused by the Court.

The votes of Assembly were admitted to prove the time of the notification of the repeal of an act of assembly by the King and Council. But not answering the purpose fully, the minutes of Council were sent for, and given in evidence without opposition.

N. B. The Defendant supported his title under a decree of the Court of Chancery established by act of Assembly; the decree was made two months after the act was repealed by the King and Council, but six weeks before we had notice of it.

THE COURT gave it in charge to the jury, that the act was not repealed, till notification here; and the jury were of the same opinion, by finding a verdict for the Defendant.

THE KING *v.* PHILIP HENRY RAPP.

INDICTMENT for misdemeanor, in marrying a man to a woman who had another husband living.—Moved, on the part of the Defendant, to put off the trial on affidavit of material witnesses wanting, and that he had taken the proper steps to get them.—Opposed by the Attorney General, as being a criminal case, and not within the rules of civil cases. But granted BY THE COURT, the Defendant being a clergyman, and his living depending on his acquittal: but declared not to be a precedent.*

THE KING *v.* HAAS and Others.

MOVED on the part of the Defendant to oblige the Attorney General to bring on the trial, or discharge the Defendant. THE COURT said they would not force the Crown to bring on the

* In Rex *v.* D'Eon, 3 *Burr.* 1513. The Court said, that in all cases, whether *criminal*, or *civil*, a trial shall not be hurried on, so as to do injustice to the Defendant.

1764. trial, nor discharge the Defendant from bail, without some appearance of oppression. *

The Lessee of RICHARDSON *v.* CAMPBELL.

PLAINTIFF supported his title by a patent dated in 1762. The Defendant produced receipts from the Proprietary's officers, with a warrant from Mr. *Peters*, secretary of the Land Office, several years prior to Plaintiff's patent, and proved upwards of twenty years possession; but the Plaintiff contending that the receipts were only for money paid on accompt of an adjacent tract, and that there was some imposition on the Land Officer when the warrant was granted; the Defendant produced a witness to prove a parol declaration of Mr. *Thomas Penn* (when he was in the country) that the land in dispute was sold to Defendant.—This piece of evidence was opposed by the Plaintiff, and refused BY THE COURT.

N. B. The Plaintiff could prove no imposition on the officer, and the Court gave a charge in favour of the Defendant, and the Plaintiff would not take the verdict, but became nonsuit.

STORY and WHARTON *v.* AMOS STRETTELL.

SUR Policy of Insurance. The captain's protest in *Jamaica* under the seal of a Notary Public there, given in evidence to prove the capture, and not opposed.

Instructions from the Plaintiffs (owners of the vessel insured) to the captain at the time of his sailing, sworn by the captain to be the only instructions he had, were given in evidence by the Plaintiffs, to prove they had given the captain no orders to buy the vessel on their account in case of a capture and re-capture, slightly opposed by Defendant's council, and given up without debate.

The Defendant in this case underwrote an open policy on the vessel from *Philadelphia* to *Jamaica*, she was taken by the enemy and re-taken, and carried into *Jamaica*, where by agreement between the captain and re-captors, without going into the Court of Admiralty, she was sold at public sale for about one fourth of the sum insured, and bought by the captain for the former owners, who afterwards acquiesced in the purchase, and now sued for the whole sum insured as a total loss. The sale was proved to be fair, and the Plaintiff's council insisted that from the moment of the capture, there was a total loss, and cited divers cases to shew, that if there be a capture, though it be not such a one as by the law of nations would change the property, yet it would be sufficient to charge underwriters with a total loss, and the assured may abandon.—*Beaws Lex Mer.* 268. *Conyngham* 225. 259. 300. 340.

* But see the *Hab. Corp.* Act, § 3. Passed the 18th Feb. 1785.

On the part of the Defendant, it was insisted that he ought to pay no more on this policy than the actual loss sustained by the payment of salvage and other charges. That the captain having set up the vessel to sale without any orders of the Court of Admiralty, and purchased her himself in behalf of the owners, for about one fourth of the sum insured, and this being acquiesced in by the Plaintiffs, there was no abandonment, and therefore but an average loss. 1764.

THE COURT gave a charge in favour of Defendant; and the jury accordingly gave the Plaintiffs a verdict for so much only as they judged a compensation for salvage, charges, and loss of time, on account of the capture.

September Term, 1764.

WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, } Justices.
ALEXANDER STEDMAN, }

KING's Road. On confirmation of a road by the justices of *Chester* county, the record was brought up by *certiorari*; and it was moved to reverse the judgment of confirmation, because the justices below had refused to grant a review, though petitioned thereto, by a person who complained he was aggrieved by the roads running through his improved ground.—On argument, THE COURT reversed the judgment for that reason, alleging that a review, though not taken notice of in the act of Assembly, had always been granted, and was now become a matter of right.

HUGH DAVEY et ux. *v.* PETER TURNER.

THIS cause came before the Court for a determination on a special verdict, which found, That the Defendant's late wife *Sarah*, before her marriage, was seized of the lands in question in fee; that after her marriage, with the Defendant, she and her husband joined in a conveyance to two trustees and their heirs, "*Habendum* to them and the survivor of them and his heirs for "ever, in trust nevertheless to and for the proper use and behoof "of the said *P. Turner* and *S.* his wife, for and during their joint "lives, and from and after the decease of either of them, then to "and for the sole and proper use and behoof of the survivor of "them and his or her heirs for ever." That the said *P. Turner*

1764. and *S.* his wife appeared before *W. P.* Esquire, then one of the justices of the Court of Common Pleas, for the county of *Philadelphia*, and acknowledged the said indenture to be their deed, and that the said *Sarah* was then and there, secretly and apart from her said husband, examined by the said *W. P.* and on such private examination did declare, that she did sign, seal and execute the said indenture, with her full, free and voluntary consent, which acknowledgment and examination were then indorsed by the said *W. P.* under his hand and seal, upon the indenture. The special verdict goes on and finds, that for fifty years and upwards, it had been the constant practice and usage of the province of *Pennsylvania*, in cases where *Baron* and *Feme* have been desirous to settle, sell and dispose of the estate of the *Feme*, for the *Baron* and *Feme* to join in a deed or deeds, and for the *Feme* to go before some Justice of the Peace, in the county where the lands lie, out of Court, and for the said justice to examine such *Feme* in private and apart from her husband, respecting her signing and executing such deed, and to interrogate her whether she became a party to and executed such deed with her full and free consent, and on her declaration that she freely consented, for the justice to certify the same under his hand and seal. And that a great number of titles to valuable estates in this province, were held under, and did depend upon deeds executed by *Baron* and *Feme*, in manner aforesaid. And that the titles to such estates had never before been called in question, but that such deeds of *Femes Covert* and their husbands had always been allowed to be given in evidence in Courts of Justice; that scriveners had generally conducted themselves by this usage, in transferring estates, and that only two fines had ever been levied in this province for conveying the estates of *Femes Covert*. The jury further found that the said *Sarah* died without having any issue born alive, and the Plaintiff's wife was one of her heirs at law.

The principal question was, whether this mode of conveyance of the estates of *Femes Covert* could be supported by the usage, as found by the jury.

On the part of the Plaintiff it was urged, that by law a *Feme Covert* cannot convey her estate but by fine, in which she must be examined by writ; that the usage in this case was not sufficient to alter the law, not being from time immemorial, and was unreasonable, because it had no lawful commencement, a *Feme* being supposed by the law to be under the coercion of her husband; and for this purpose *Godb.* 143. was cited.—That supposing the custom good, the deed in the present case was variant from the custom as found in the special verdict; for that the usage ratified this kind of conveyance only in such cases, where the *Feme* was willing and desirous to convey, and where she declared she became a party to the deed freely; and that it is not found the *Feme* in this case was willing and desirous, and had declared she became a party thereto; for though it is set forth, that she declared she executed the deed freely, yet it does not appear the deed was read, or the contents made known unto her,

without which she could not be said to become a party. Another variance insisted on was, that the examination required by the custom must be by a *Justice of the Peace*, and in this case *W. P.* is not said to be a Justice of the Peace, but a Justice of the Court of Common Pleas.—It was further urged, that the deed in this case was void, for two reasons: 1st, Because, though the conveyance is to trustees, yet the use is to the *Baron* and his heirs, which, by the statute of uses, vests the legal estate immediately in the *Baron*, and so is no other than a conveyance from the *Feme* to the *Baron*, which is void. The 2d reason was, that the deed wanted a consideration, there being none mentioned but marriage and five shillings. That the marriage was past, and a past consideration is no consideration, and the five shillings said to be paid to the *Feme* was in fact the property of the husband, so no consideration to her. 1764.

On the part of the Defendant it was answered, that though by the law of *England* a *Feme Covert* cannot convey her estate without an examination by writ, yet in this country a different manner of examination has obtained from the first settlement of the province, in substance the same as an examination on a fine, which probably in early days could not be levied here for want of skill in the professors of the law; and that now the greater part of the titles in the province depend, in some link of the chain, upon this kind of deeds, it would be highly inconvenient, and would introduce the utmost confusion, to overset them. That common recoveries have their validity from usage, and that if this be an error, it is within the maxim, *Communis error facit jus*. As to the reasonableness of the usage *Brook. tit. faits.* § 14. 15. was cited to shew an examination of *Feme Covert* before the Lord Mayor in *London* was good without a fine. And to shew the force and extension of the maxim, *Communis error facit jus*, many authorities were cited. *Carth.* 283. 4 *Sid.* 190. 2 *Mod.* 238. *Jenk.* 162. 250. *Anderson* 49. 2 *Ab. Eq. Ca.* 200. *Hob.* 83. *Salk.* 33. *Co. Litt.* 112. *Shepherd's Touchstone* 516. *Comb.* 320. 342. *Stiles* 320. As to the variance between this case and the usage, it was said the *Feme* had declared she executed the deed with her free consent, and that it must be taken, the magistrate did his duty in making her acquainted with the contents. As to the other variance, it is notorious that a Justice of the Common Pleas is a Justice of the Peace, in this province, being appointed to both offices in one commission, and the Court will *ex officio* take notice of so general a practice. As to the objections against the validity of the deed, it was answered that though a deed would be void immediately from *Baron* to *Feme*, yet it would be good when made to trustees to the use of the *Feme*. *Co. Litt.* 112. And the consideration of five shillings, though not a valuable one, is a good consideration in the eye of the law.

By the Court, after advisement: These deeds, and this mode of examination of *Femes Covert* on conveying their estates, having generally prevailed in this province, from its first settlement, and

1765. undergone from time to time the notice of the courts of Justice, it would be very mischievous now to overturn them. The maxim *Communis error facit jus* cannot operate more properly than in this case; and the Court unanimously adjudge the law to be with the Defendant.

September Term, 1765.

Present WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, } Justices.
ALEXANDER STEDMAN, }

The Lessee of STRICKLAND *v.* REBECCA POOLE.

TO prove *Pedigree*, evidence permitted to be given of *hearsay* a great while ago, before any dispute stirred.

September Term, 1766.

Present WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, } Justices.
ALEXANDER STEDMAN, }

The Lessee of THOMAS *v.* HORLOCKER.

PLAINTIFF produced a deed bearing date sixty-three years ago, appearing on inspection to be ancient; one of the witnesses proved to be dead, the other not known. Possession had not attended the deed, and no other account was given of it, or the witnesses, than by the evidence of a person who swore he had well known one of the witnesses, and had seen many deeds and papers signed by him, and from thence believed his name to this deed, to be of his hand writing, but had never seen him write. THE COURT on debate thought this a sufficient proof of the deed considering its *antiquity*, and it was read in evidence.

1767.

September Term, 1767.

Present WILLIAM ALLEN, Chief Justice.
WILLIAM COLEMAN, JOHN LAWRENCE, THOMAS WILLING, } Justices.

BOEHM and SHITZ *v.* ANDREW ENGLE.

ACTION on the case for £. 802. The Plaintiffs under a power in the will of *Henry Bolster*, deceased, had sold at public vendue to the Defendant, a house and lot in the city of *Philadelphia* for £. 802, and shortly after tendered him a deed for it, which the Defendant refused to accept, being advised by council that *Bolster* had no good title to the lot.—Upon which the Plaintiffs brought a special action on the case for the consideration money.

On the trial, in support of *Bolster*'s title, the Plaintiffs produced a patent to *Jane Batchelor*, dated 1694, and a deed from one *Richard Tucker* (who had married *Jane Batchelor*) to *John Chambers* dated 1685, and deduced a regular title from *Chambers* down to *Bolster*. The Plaintiffs acknowledged the defect in the title, in *Tucker*'s conveying his wife's estate without her joining in the deed, but insisted on sixty years *possession* as giving a good title under the statute of 32 *H.* 8. *c.* 2.

The council for the Defendant denied the extension of that statute, and urged that if the 32 *H.* 8. extended, the statute of 21 *Ja.* 1. *c.* 16. likewise extended, being both made before the settlement of the province, but it appears to have been the opinion of the legislature of this province, that these statutes of limitations did not extend, by their having made an act to limit *personal actions* in the very words of the statute of *James*.* It was likewise contended on the part of the Defendant, that though the statute of 32 *H.* 8. should be extended, yet this case was not within it; because, 1st, The act was made on a presumption that there might have been regular conveyances and lost, but here it appears there was no conveyance at all from the wife by *Tucker*'s granting for himself *and his wife*.—2d, There is no proof of sixty years possession, the witnesses for the Plaintiff speaking only to 44 years back.—3d, The act of 32 *H.* 8. does not operate unless sixty years elapsed *since right of entry accrued*, and here *Tucker*'s wife had no right of entry till the death of her husband, which was in 1708 and not sixty years ago. There was another point made for the Defendant, that in one of the mesne conveyances, about sixteen years ago, the wives of the grantors had not joined in the deed, and were now living, and consequently might be intitled to dower.

* 12 *Ann. c.* 2. see 1 *State Laws* 69. and 1 *Geo.* 1. *c.* 8. *s.* 6. see 1 *State Laws*, 78.

1767. For the Plaintiffs it was answered, that in 2 *Peere Williams* 75. and many other cases, it was settled that all acts of parliament made before the settlement of the colony extend, unless local in their nature; that under this rule the statute of wills, statute of uses, and many other statutes, were always held to extend; and that the reason of this act extended as well as any other. That as to this case not being within the act, the presumption spoken of was not justified by the act itself, which extended to every case. 2d, Though the witnesses swear only to forty-four years possession, yet after such a length of time it should be presumed the possession had been from the date of the deed to *Chambers*, which was in 1685. 3d, The rights of *Femes Covert* are not saved in this act (except such *Femes Covert* as were in being at the time of making the act) and possession was out of *Tucker*'s wife from the time of her husband's deed to *Chambers*.—As to the last point it was said, that it was picked up at the bar, and not objected to at the time of tendering the deed; that it did not strictly go to the title, but was only a claim of two old women for their lives. which the jury might take notice of, if they pleased, by lessening the damages.

THE COURT were unanimous and clear in their opinion, that the act of 32 *H.* 8. did extend to this province, and gave it in charge to the jury accordingly.*

The verdict of the jury was conformable to this opinion, by their finding for the Plaintiffs, having made an allowance for the lives of the two women in the damages.

April Term, 1768.

WILLIAM ALLEN, Chief Justice.
JOHN LAWRENCE, THOMAS WILLING, } Justices.

RICHE and RICHARDS *v.* BROADFIELD.

AN account of sales of an adventure shipped to *New-York*, said to be signed by the factor, offered in evidence to prove a loss on the goods. Objected, that the factor himself ought to have been brought to give evidence, *viva voce*, or at least the account should have been proved by him, and certified under the city seal of *New-York*, agreeably to the directions of the act of parliament with regard to the proving colony debts in *England*.—Answered, That this being a mercantile transaction, such evidence as merchants usually admit as proofs of a foreign transaction, should be received here.

* See S. P. *Morris' Lessee* v. *Vanderen post.*

BY THE COURT.—The strict rules of law with regard to evidence ought not to be extended to mercantile transactions. In this case, on proving the hand-writing of the factor, let the account of sales be given in evidence; which was accordingly done. 1768.

JOHN SWIFT *v.* HAWKINS and Others.

DEBT sur Obligation.—On the plea of payment Defendants offered to give no consideration in evidence. Objected, that the consideration of a bond is not enquirable into, the passing the bond being a gift in law of the money.—To this it was answered, and so ruled BY THE COURT, that there being no Court of Chancery in this Province, there is a necessity, in order to prevent a failure of justice, to let the Defendants in, under the plea of payment, to prove mistake or want of consideration: And this the Chief Justice said he had known to be the constant practice of the Courts of Justice in this Province, for thirty-nine years past.

For the Plaintiff, the following cases were cited: *Plowd.* 308. *b. Gilb. Rep.* 154. *Hard.* 200. 3 *P. Will.* 222.*

The Lessee of LLOYD *v.* TAYLOR.

EJECTMEMT for ground in the city of *Philadelphia*. *Mercy Masters* being seized in fee married *Peter Lloyd*. *Peter Lloyd* and *Mercy* his wife convey to *Ralph Asheton* in 1727. *Ralph Asheton* reconveys to *Peter Lloyd* the land in question. Afterwards, in 1738, on a judgment against *Peter Lloyd*, the land in question was taken in execution and sold by the Sheriff to the Defendant for £. 1300.—Plaintiff claims as heir at law to *Mercy Lloyd*, insisting that his mother being a *feme covert* could not legally convey her estate without an examination by writ. And though in the case of *Davey* v. *Turner* tried in this Court *September* 1764,† it was ruled that an acknowledgment of the deed on a private examination before a Justice of Peace, was sufficient under a long usage to sanctify her deed, though not strictly agreeable to law; yet here there was not even that acknowledgment, or private examination.

But it appearing in evidence, that it had been the constant usage of the Province formerly for *femes covert* to convey their estates in this manner, without an acknowledgment or separate examination; and that there were a great number of valuable estates held under such titles, which it would be dangerous to impeach at this time of day, THE COURT gave a charge to the jury in favour of the Defendants, founded on the maxim *communis error facit jus*. And the Jury accordingly found for the Defendant.

* See 2 Dall. 238. † See *Ant* p. 11.

1773.

April Term, 1773.

The Lessee of the PROPRIETARY *v.* RALSTON.

PLAINTIFF shewed a title in himself to the Province of *Pennsylvania*, and then rested.

Defendant shewed a deed for one thousand acres of land—also a warrant to himself, and two others, to take up three thousand acres of land which included the lands in controversy—also a power of attorney to *David Lloyd*, to take care of said land, and an account of the expences of survey.

Defendant having shewn title in a third person, as he conceived, moved for a nonsuit, and as authorities cited *Bull. Nisi Prius*, *Instit. leg. title Eject.*

Plaintiff's Council insisted to know, whether the Defendant had gone through all his evidence; and said that he was not entitled to the opinion of the Court till then, upon his title in a third person.

BUT THE COURT determined *contra:* and then gave their opinion, that as the Defendant's deed was a conditional deed upon the face of it, he was not intitled to a nonsuit.

The Plaintiff's Council then contended, that they had a right to demur to the Defendant's evidence. This was opposed by the Defendant's Council, who insisted they had a right to go through their evidence, before the demurrer was allowed. Of which opinion THE COURT also was; and the Defendant proceeded with his evidence, among which was a letter from *William Penn*, the first, acknowledging this sale and grant.

The Plaintiff afterwards offered a subsequent letter of *William Penn*'s, declaring the grant to be conditional; and, as this condition was not performed, the grantees should not have the land.

This the Defendant's Council opposed, on the principle, that no man could create evidence for himself.

Tilghman. Letters are like conversation when the whole must be given.

Dickinson, on the same side, offered these authorities: 12 *Vin.* 101. An old manuscript evidence, *Id.* 247. The declara-

tion of a woman present at the birth of a child in proof of pedigree, 3 *Mod.* 36. to shew that the Defendant's rule of evidence is too strict. 1773.

Upon full argument, THE COURT over-ruled the evidence, upon the principle contended for by the Defendant's Council.

Some of the Defendant's Council, the next day, offered some of Doctor *Coxe*'s letters to *David Lloyd*, shewing that the condition had been complied with.

BUT THE COURT adhered to their opinion, and over-ruled these letters also.—A verdict passed for the Plaintiff, by which the sense of the Jury was, that the non-performance of conditions of settlement, did not void the grant.*

September Term, 1773.

The Lessee of BIDDLE *v.* SHIPPEN.

THE Plaintiff, among other evidence, offered a map, made by one *Zimmerman*, about thirty years ago. One *John Knorr*, *Zimmerman*'s nephew, proved that said map was the work of his uncle, at the request of the people of Germantown; that his uncle dying before he was paid for it, it remained in the family; that it contains the lines of the Germantown lots, and the adjacent out lands; that, upon any difficulty, they apply to him, and this map generally determines any dispute they may have about their lines.

Mr. *Chew* opposed this map, at first, but afterwards agreed that the lands in controversy were as laid down in it, and admitted it with a salvo of its being no precedent. Upon the Plaintiff's offering it to the Jury to take out with them, Mr. *Chew* opposed it; and some difference arising, THE COURT declared it was not proper evidence, that they should not have allowed its being offered to the Jury, nor would they suffer them to take it out with them.

* Determined at *Chester*, *Ni. Pri.* 24th August 1773.

1774. But the Court also declared that the statute of 21. *Jac.* 1. *c.* 16. of twenty years possession, extended here; and that it had never been doubted.

ANONYMOUS.

JOHN FISHER, having two sons and a daughter, made his will, and devised a plantation to his son *Matthias* in fee. *Matthias* dies in his minority, intestate, and without issue.

Question:—whether his heirs at common law shall take; or it shall divide among his other brother and sisters, under the supplemental intestate law of this province?

On a trial in ejectment for the plantation, it was agreed by Council, that the opinion of the Court should be conclusive to the Jury.

Mr. *Justice* Willing and *Justice* Lawrence were of opinion, and so delivered it to the Jury, that the estate should be divided: and the Plaintiff suffered a nonsuit.*

September Term, 1774.

Before Chew, Chief Justice,
Willing and Morton, Justices.

HURST *v.* DIPPO.

TRESPASS—The Plaintiff's Council opened that *William Penn*, by deed of lease and release, granted to his ancestor *A. Sonmans* five thousand acres of land in *Pennsylvania*; that such deeds were lost, or otherwise mislaid; and to prove the existence of such deeds, he shewed a list of names, commonly called the list of *first purchasers*, and containing a warrant, signed and sealed by *William Penn*, to his Surveyor-General, to

* Determined at *Bucks*, *Ni. Pri.* 15 Oct. 1773. See *Kerlins* v. *Bull*, *post.* 176.

survey the several quantities of land there mentioned; which the Plaintiff contended was good evidence to prove his title—Defendant demurred to Plaintiff's evidence. 1774.

A question then arose, whether it should be stated that the Plaintiff's ancestor *A. Sonmans* was seized in fee by virtue of a grant from *William Penn*; or whether the list of purchasers should be set forth *verbatim?*

After long debate, THE CHIEF JUSTICE gave the opinion of the Court as follows:

CHEW *Chief Justice*:—Though demurrers are disused, yet the law is not uncertain. It is a settled rule, that courts of law determine law; a jury facts. Upon which maxim, every security depends in an English country.

When a deed is produced in evidence, it must be shewn in *hæc verba* on the demurrer. There is a difference between *Baker*'s case as reported in *Croke* and *Coke:* but it is law, that when facts are attempted to be proved by witnesses, the fact must be admitted; but previous to the admission of a fact, circumstances or evidence must be shewn, tending to prove such fact. There may be a demurrer to evidence, either parol or written; and there may be written evidence to prove a fact.

The difficulty in this case is, whether this list of purchasers is sufficiently descriptive of the nature of the estate, in the deed referred to. We must for the security of the province, take notice of the circumstances of this province. It is well known what kind of a transaction this was. *William Penn*, soon after his grant from the crown, sold lands in small parcels. It appears he made deeds for sundry small parcels of land, and received the money. These grants were in the province at large: the party must do something more to appropriate the land. By this list, he expressly says, it is an account of the lands granted to purchasers; is it not then a proof, that *William Penn* made a grant, among others, to *A. Sonmans*, for five thousand acres of land in Pennsylvania?

It sufficiently appears a deed did exist; but it may be asked, what was the nature of that deed—what kind of an estate passed by it? Whether it is proper to go out of the evidence, may be questionable. The word *purchase*, however, implies a purchase in fee; and there is no instance where any other estate was granted. Besides the custom of the province in the like cases, shews what was the nature of the purchase.

The Court do not take upon themselves to say, what the deed was: and, under all the circumstances of the case, we think it not proper to insert this list in the demurrer. If the Defendant's Council will not agree to state an estate in fee in the Plaintiff's ancestor, it must go to the Jury to draw their inference of the nature of the estate, from the evidence laid before them.

1776.

April Term, 1776.

Before CHEW, Chief Justice.
LAWRENCE, Justice.

STEINER *v.* FELL and Others.

PLAINTIFF brought an action of debt on an arbitration bond in *Bucks* county, Common Pleas. Defendant pleaded *null award.* Plaintiff replied, and set forth an award. In September Term, 1775, Plaintiff got a rule for rejoinder in six weeks, or judgment. Before the six weeks expired, Defendant's attorney gave him a rejoinder, and, at the same time, shewed him a *habeas corpus*, by which he intended to remove the cause to the next *Supreme Court.* Plaintiff, choosing that the proceedings should go up above, as they were below, took out a *certiorari*, and, going into Court the first day of the term, got it allowed—The next day the Defendant presented the *habeas corpus*, to which Plaintiff's attorney objected, for that the record was removed by the *certiorari*—The Court below agreed to send up both writs, and let the *Supreme Court* receive the record on which they pleased.

Now it came on to be argued, and the Plaintiff's Council contended, that the record should be received only on the *certiorari; First*, for that, when the other writ was presented, there was no record before the Court, on which the *habeas corpus* could operate, and that the power of the Court below was exercised. *Secondly*, that if that could not be allowed, yet both writs might be returned *reddendo singula singulis;* the *certiorari* might remove the cause, and the *habeas corpus* the body; and there was no inconsistency in so doing.

The Defendant's Council rested it on the advantage taken of him, and on the constant practice of the Court with respect to writs of removal.

BY THE COURT. Whenever a writ issues fairly, if it is first delivered, it shall take preference—The proceedings, on a *habeas corpus*, are *de novo;* on a *certiorari*, the Court proceed on the state returned. Therefore, both writs cannot issue in the same cause; for the Court cannot proceed *de novo* and on the old record too; which upon the idea of returning both writs must be done. In this case, the Defendant not having affected delay, but

proceeded in the usual course, having taken out the first writ, and delivered it as soon as was usual, his writ should take preference; and the Court accordingly order the return to be made on the *habeas corpus*. 1776.

WHEELER Assignee of BAYNTON *v.* HUGHES Ex.

JOHN HUGHES, the 16th of *February* 1763, gave his bond to *John Baynton*, conditioned for the payment of one thousand pounds. On the 3d *September* 1764, *John Baynton* and *Samuel Wharton*, became bound jointly and severally, to *John Hughes* in a bond conditioned for the payment of six hundred and eight pounds fifteen shillings. On the 8th of *May* 1765, *John Baynton* assigned the one thousand pound bond to the Plaintiff, *Ann Wheeler*, for a just debt, she being ignorant of any dealing between *Hughes* and *Baynton*. This action was brought on the assigned bond; the Defendant pleaded payment, and offered in evidence the bond dated in *September*, in bar of the Plaintiff's recovery. To this the Council for the Plaintiff objected, and this day, viz. 23d *April*, the cause came on to be argued.

The Council for the Plaintiff contended, that by the * act of assembly, bonds, bills and notes were negotiable, as promissory notes in *England* under the 3 and 4 *Ann. cap.* 9; that negotiability imported a currency from hand to hand; that this act of assembly was formed on the plan of the statute, in many places using the same words, and being made for the same purpose, viz. *to encourage trade and commerce*, which could only be effected by such a construction, as that an assigned bond should have a currency, from hand to hand, and that the possessor should recover, independent of any contracts or dealings between the obligor and obligee; that the clause in the act of assembly, "Should com- "mence and prosecute his, her, or their actions at law, for the re- "covery of the money mentioned in such bonds or notes, or so "much thereof, as shall appear to be due at the time of such as- "signment," meant as shall appear on the face of the instrument itself—That, for this reason, the obligor should either guard, in making the contract, by leaving out the negotiable words, or should get his payments indorsed on the bonds; that the words, "To recover as the person or persons to whom the same was or were made payable," only referred to the mode of recovery, where the assignee brought his action in his own name, as he might under this act; that any other construction would defeat the intention of the act, which was to encourage trade and commerce; but if the assignee was to take the bond subject to the dealing between the obligor and obligee, there was an end of this species of traffic, as no one would ever take an assigned bond in the course of trade, or in any other case, but of a doubtful or desperate debt.

To shew that a third person, coming in *bona fide*, and for a valuable consideration, would be in a better situation than his vend-

* 1 *Geo.* 1. *c.* 8. See 1 *State Laws* 77.

1776. or, the following cases were cited: 1 *Siderfin.* 134. A. made a feoffment to B. by covin. B. makes a feoffment to D. for a valuable consideration and *bona fide*. The first feoffor enters and makes a feoffment for a valuable consideration—The feoffee of the first feoffee shall retain the land. *Cro. Jac.* 32. Debt on obligation for two hundred pounds: Defendant pleads the statute of usury, and shews that he was indebted to one *Alder* in one hundred pounds, and agreed with him that he should forbear him for a year in consideration of thirty pounds, and that he should make a bond to *Alder* for the payment of thirty pounds, and for payment of one hundred pounds. That then he and *Alder* entered into the bond for two hundred pounds. The Plaintiff replied that *Alder* was justly indebted to him in one hundred pounds, and for payment thereof entered into this bond, that he was not knowing to any corrupt agreement between the Defendant and *Alder*. The Court determined in favour of the Plaintiff upon his being a fair and innocent creditor.—To shew that promissory notes in *England*, are not subject to any discount or set-off, between the promiser and promisee, the following cases were quoted. 1 *Salk.* 126. Bill lost; finder transfers it to C. for a valuable consideration—the original owner cannot bring trover against C. 1 *Burrow.* 459. S. P. 1 *L. Raymond* 738. 2 *Burr.* 675. 6. 1224. 1227.—2 *Freeman* 257. Bill payable to A. or bearer, is like so much money paid to whomsoever the note is given; that let what discount, or conditions, soever, be between the party who gives the note, and he to whom it is given, yet it shall not affect the bearer.—3 *Bacon, title Merchant. Comyns* 43. *Marius* 72. 3 *Burrows* 1523. 27. 29.

It was contended farther by the Plaintiff, that the act of assembly had changed the nature of these contracts; that they were not to be construed on commercial principles only; that the doctrine of the Defendant established this principle, that it was *nudum pactum*, there was no consideration at the time of the bond being given or assigned. To which it was answered, that, judging on commercial principles, a want of consideration was no objection, for there is no such thing as *nudum pactum* in mercantile transactions. 3 *Burr.* 1669.—Plaintiff also denied Defendant to be within the defalcation act.

The Council for the Defendant contended, that it was not the intention of the legislature to make bonds negotiable here as promissory notes in *England*. They allowed the law as laid down in the above cases, but denied the application; insisting that they stood upon quite a different footing—That nothing more was meant by the act, than to give assignees the benefit of suing in their own names and preventing any release, or other dealings, affecting the assignee after assignment once made; that in *England*, a bond passes into the hands of an assignee subject to all the equity it had in the hands of the assignor, for which they quoted 6 *Vern.* 692. 675. 10 *Mod.* 445. 1 *P. Wms.* 383. 452. 459. That the construction, contended for by Plaintiff, would open a door to numberless frauds; that a satisfied bond might be passed away, and the obligor compelled to pay it twice; that even a forged bond might pass

in the same manner; that the preamble has little weight in the construction of a law, being often made by the clerks in parliament; that trade and commerce would be best promoted by their construction, as it would only impose a duty on a person taking a bond, to enquire in what state it stood. 1776.

That in case of bonds mislaid, or lost, no money could be paid on them; that the intention of the legislature was to make these bonds, bills, &c. subject to a common law remedy, and substitute the doctrine of the courts of equity in *England* in this province, and no farther. That it was evident, that a general negotiability was not intended; if it had, the legislature would not have varied the expression in those parts of the statutes, expressly referring to inland bills of exchange, and making promissory notes negotiable as bills of exchange; the act of assembly, on the other hand, expressing such a recovery by assignee as the assignor could have had, and confining the recovery to such money as was due at the time of the assignment. That this was further confirmed by the last clause of the act, which prohibits the assignee releasing any money actually, or really, due. That custom and practice, which are good expositors of laws, are with them; and that the statute of 4 and 5 *Ann.* being declared on, shews it was the sense of the practitioners, that promissory notes are not negotiable here as in *England*. That as to the defalcation act, it is a remedial law, and to be extended by equity to all cases within the same mischief; that though that part of it, which gives a *scire facias*, does not apply to this case, yet the other part does; and the Defendant is fairly within the reason of it.

The Council for the Plaintiff, in reply, admitted the law in *England* as laid down by the Defendant in the case of bonds; and, that before the statute, promissory notes were only evidence of a debt; there was no property transferred; but that the act of assembly and act of parliament, being made *pari materia*, are to receive the like construction. That the construction made by the Defendant, would render the act nugatory. That merely to give the assignee a right of suing in his own name, unless some solid advantage attended it, was trifling, nor would it at all encourage trade and commerce. That a limited negotiability was an absurdity; it must be negotiable, or not; if negotiable, it was so in all cases when honestly come by, or not at all. That the intention of the act must wholly fail, if assignee is only to stand in the place of assignor, and his recovery made to depend on circumstances and proofs, which, in the nature of things, are not in his power. That to say the assignee must make inquiry before he meddles with the bond, is begging the question. We contend, that this act of assembly meant something, and that was, for the sake of trade and commerce, to annex a property in the debt, and a currency to the paper, and to improve vigilance in the debtor, to take care either to guard his contract in the first instance, or in case of payment, or other satisfaction, to see his payments indorsed, or his bond cancelled.

1776. That there is no ground for supposing the intention of the law was only to give a chancery jurisdiction; because there was a chancery in this province until the year 1718; since this act passed, and as soon as ever the chancery powers ceased to be exercised, the courts of law took them, and have exercised them to the great satisfaction of the province. That, if they were competent in one case, they were also in another; and they have in many instances gone much farther than in this. That, in construing this law, we are to regard the state of the province at that time. There was little specie; no paper currency; a medium of trade was wanted; the act of parliament had shewn how promissory notes had been made a medium of commerce; they took it for their guide, and extended it to bonds and penal bills. That the variance in wording the act is easily accounted for. Foreign bills of exchange were not in much use, inland bills not known; to have used the language of the act of parliament, would have been penning laws in a language not understood, and it would be absurd to refer to a species of contracts known and understood by very few in the province. That custom and practice is with the Plaintiff, as there is scarcely a news-paper which does not forewarn persons from taking assignments of bonds, bills, notes, &c. —a practice peculiar to this province, and, therefore, most plainly demonstrating, that this law made such a change in these assignments, as to put an obligor in a worse situation in case his bond was assigned, than while it continued in the hands of the obligee. That the practice of declarers in this province on promissory notes under the statute, may with more propriety be resolved into the convenience and ease of the lawyers, than flowing from any principle of law. That the defalcation act is expressly confined to persons having dealings together; and as a *scire facias* is admitted not to lie, it must be a new construction of statutes, which makes a person a subject of a statute in one part, and not in another;—that he may be prejudiced under the law, but can receive no benefit from it. The Plaintiff's Council closed with a case from *Lancaster* determined by Messieurs *Lawrence* and *Willing*. It was that of *Bausman* assignee of *Henry Bough*, assignee of *Jacob Stily*, assignee of *Henry Waggoner*. The action was brought on a note of hand for one hundred and four pounds. Plea, payment. Defendant offered to shew in evidence an agreement, signed by *Waggoner*, the original promissee, made at the time the note was given, tending to shew a want of consideration. Plaintiff objected—The Court held it could not be offered, as it would effectually destroy the negotiability of notes; and said it would be attended with the most dangerous consequences, if the claim of an honest assignee of a bond, or note, should be defeated by any bargains, or agreements, made at the giving such notes, or bonds, and not expressed therein. The evidence was accordingly over-ruled.

The Court took time, till the 25th *April*, to consider, and this day gave judgment.

CHEW, *Chief Justice*. The question in this case is, whether *Hughes* can have the same defalcation against *Wheeler*, which he could have had against *Baynton*, if this bond had not been assigned? 1776.

It was contended for the Plaintiff, that bonds were negotiable as inland bills of exchange.

It was also contended, that defalcation by the act, is only where there are dealings between the parties.

For the Defendant it was contended, that the act does not make them negotiable, as bills and notes are by the statute of 3 and 4 *Ann. c.* 9.

It is plain however that the act was drawn from the statute, for in many places it follows it, *totidem verbis*, though in others it varies. This shews the legislature intended in those instances, to vary the law. Bills in England were negotiable before the statute; notes were only evidence of a debt; the statute was made to put them on the same footing with bills.

The question is, whether the act of assembly has done the same as the statute? He then compared the act with the statute, to shew that it was drawn from the statute.

The act however says, "for the encouragement of trade, commerce, and credit;" the statute adds, "and to make notes negotiable in the same manner as bills." This is a material variance, and is carried through the act.

The Defendant relied on the words in the act entitling assignee to recover the money, that should appear to be due, in like manner as obligee could.

Here is the same variance as before; for, by the statute, the assignee is to recover what shall be due, "in like manner as indorsee of a bill of exchange."—Had the act pursued the statute in these respects, or expressed the same meaning in other words, the Plaintiff would be right.

What shall appear to be due at the time of the assignment, has been differently applied by the opposite Council:—The Plaintiff's Council contended, that it meant what appeared to be due on the bond; so that, if the bond should be paid, yet if payment was not indorsed, the assignee might recover the whole.

The Defendant contended, that the clause related only to the manner of proceeding, enabling the assignee to sue in his own name.

We have considered this matter very deliberately, and are clearly of opinion, that the variance between the act and the statute, was intentional, not accidental.

An argument of force with us, not mentioned by the Defendant, arises from the wording of the act.

The words "so much as shall appear to be due," relate to the time of trial, and not to the time of the assignment;—they are in the future tense.

1776. It has been said, that it is the obligor's fault not to have the payment indorsed on the bond; but it is not in his power, for the money must be paid before he is entitled to a receipt; and then, if the obligee is a bad man, he may refuse to indorse it.

We are, therefore, clearly of opinion, that an assignee takes the bond at his own peril; and that he stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of the assignment. The only intent of the act being to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment.

Judgment for the Defendant.

Township of FALLOWFIELD *v.* Township of MARLBOROUGH.

ON *Certiorari* to *Chester*, to remove an order and judgment of sessions, for the removal of *James Heany*.

Exceptions taken to the proceedings below—That it did not appear the pauper had been examined; nor was any reason set forth why he was not: That natural justice required he should be heard before he was removed. And the following cases were cited:—2 *Salk.* 488. to shew the examination must be by two Justices.—2 *Stra.* 1092. S. P. *And.* 238.—*Sett. Cas. c.* 18.

But it was answered: 1st. That it was not necessary that the examination should appear on the face of the order. Justices are not obliged to set forth evidence, or every little circumstance; that when nothing is set forth which appears to be wrong, the Court will make an intendment in favour of their order. An order to a common intent good. 1 *Stra.* 211. That it is not necessary to set forth the summons and examination of the party.—1 *Stra.* 474. 630. 211. 2d Lord *Ray.* 1406.

2d. That even if it was necessary, there are words in the order equivalent, viz. *on due consideration*, which implies due examination—3 *Burn. Sess Cas.* Also the words *due proof.* Also the words on the examination of *Samuel Heany* "*as otherwise.*"

That in the cases from *Salkeld*, there appeared a defect of examination on the order, it having been taken by one Justice instead of two.

BY THE COURT.—No case can be shewn, where an order was deemed bad, because the examination did not appear on the face of the order.

Comb. 474. is a book of no great authority, and this case is contradicted by many others.—We are of opinion that it is not necessary that an examination should appear on the face of the order; nor is it necessary that the examination of any person should be set forth. If any pauper was injured by a removal, the

remedy might be had here, on information; and, though it will not restore him, yet he might have complained to the sessions, where every thing was open. 1776.

The order of sessions confirmed, with costs.

KEPPELE *v.* WILLIAMS.

A *VENIRE* had issued, and the Jury was summoned: the Plaintiff forbade the Sheriff to bring the Jury to the Court. —On the day of trial, the Plaintiff's Attorney demanded the *Venire*.—Defendant's Attorney opposed it, and advised the Sheriff to deliver it into Court.

The Jury also attended upon the application of Defendant's Attorney. The Court was then moved for their direction.

They took the *Venire* and called for the pannel.—The CHIEF JUSTICE quoting the following authorities, to shew, that it would be a contempt to pocket the *Venire*.—*Comb.* 303. 4 *Mod.* 367. *Vin. Abr. Tit. Trial* 329.

The Plaintiff then moved to continue the cause which was allowed, Defendant having no proviso rule.

Defendant then moved for a proviso rule, to which Plaintiff objected, and made affidavit of the absence of a material witness, and service of a subpœna, on which the motion dropped.

HERE terminate all the decisions, previously to the Revolution, which I have been able to collect. For the cases, from the *first* page to the close of the *seventeenth*, I am indebted to the *Honorable* EDWARD SHIPPEN, *Esquire;* who obligingly permitted me to publish them from his manuscript, in the possession of Mr. *Burd.* The rest of the cases, through the kindness of the *Attorney-General*, I have had an opportunity of extracting from the note book of the deceased *Joseph Reed*, Esquire, formerly President of this State.

Reports of Cases,

SINCE THE

REVOLUTION.

ON the organization of the COURTS of JUSTICE under the CONSTITUTION, established by the GENERAL CONVENTION, elected for that purpose, and held at *Philadelphia*, July 15th, 1776, and continued by adjournments to *September* the 28th, 1776, the following appointments took place:

The Honorable THOMAS M'KEAN, Esquire, L. L. D. was appointed CHIEF JUSTICE of the SUPREME COURT, on the 28th day of *July* 1777.

The Honorable WILLIAM AUGUSTUS ATLEE, Esquire, was appointed a JUDGE of the SUPREME COURT, on the 15th day of *August* 1777.

The Honorable JOHN EVANS, Esquire, was appointed a JUDGE of the SUPREME COURT, on the 15th day of *August* 1777.

Jonathan Dickinson Sergeant, Esquire, was appointed *Attorney General*, on the 28th day of *July* 1777.

Edward Burd, Esquire, was appointed *Prothonotary* of the SUPREME COURT, on the 12th day of *August* 1778.

Oyer and Terminer, &c.

AT PHILADELPHIA:

September Sessions, 1778.

Before M'KEAN, *Chief Justice.*
ATLEE and EVANS, *Justices.*

RESPUBLICA *v.* MOLDER et al.

AFTER full argument by *Wilson*, *Ross* and *Lewis*, Council for *Joshua Molder* and *John Taylor*, indicted for treason, and of the *Attorney General* and *Reed* in behalf of this Commonwealth:

It is ruled BY THE COURT, That every person accused, or indicted of *High Treason*, shall have a copy of the whole indictment (but not the names of the witnesses) a reasonable time, not less than one day before the trial; his attorney, council, or agent requiring the same, and paying reasonable fees therefor: And shall also be furnished with a copy of the pannel of the jurors who are to try him, duly returned by the sheriff, and delivered to him, or his council, a reasonable time, not less than one day, before his trial.*

RESPUBLICA *v.* MALIN.

INDICTMENT for *High Treason*.—The prisoner, mistaking a corps of *American* troops for *British*, went over to them. And now the *Attorney General* offered evidence of words spoken by the Defendant, to prove this mistake, and his real intention of joining and adhering to the enemy.

This was opposed by the Council for the *Defendant*, who contended, that as words did not amount to treason, no general evi-

* See 2 *Dall. Rep.* 335. 343.

1778. dence could be given of a man's sentiments; but that the intention expressed by any words offered in evidence, must relate immediately to the *overt act* laid and proved on the indictment; that although an adherence to the *British* troops was treason, yet, an adherence to *American* troops, even under a supposition that they were *British*, did not amount to that crime; and that the opinion, that words joined with actions made treason, however ingeniously supported, failed in point of law. See 3 *Cro.* 352.

The *Attorney General*, on the other hand, admitted that words alone do not amount to treason; but, he insisted, that they were proper evidence to explain the Defendant's actions on a trial for that crime. 1 *Hawk.* 39. *Fost.* 202. For, though barely being within the enemy's camp might be innocent; yet if it could be shewn, that the intention of going thither was to join and adhere to them, the evidence ought to be received.

By the Court:—No evidence of words, relative to the mistake of the *American* troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason.

But, as it appears, that the prisoner was actually with the enemy at another time, words indicating his intention to join them, are proper testimony to explain the motives, upon which that intention was afterwards carried into effect.

The *Attorney General* then called a witness to prove that the Defendant was seen parading with the enemy's light horse in the city of *Philadelphia*.

But to this, also, his Council objected: For, they urged, that every criminal act must be tried in the county in which it is committed. *Cro. C.* 247. 4 *Bl. C.* 301. 3 *Inst.* 48. 49. 80. And that the circumstance of merely joining the enemy's army, being neither treason, nor misprision of treason, unless done with a traitorous intention, no *overt act* had been proved in *Chester*, which was a pre-requisite to any evidence being heard of an *overt act* committed in any other county. To evince that this was, likewise, the sense of the legislature, the Defendant's Council read the act of Assembly giving the *Supreme Court* a special power to try offenders in *Lancaster*, for crimes committed in the counties of *Chester* and *Philadelphia*.

The *Attorney General* answered, that when an *overt act* is proved in the county where the trial is held, corroborative evidence may be given of *overt acts* committed in any other county. *Fost.* 9. 2 *Hawk.* 436. And that having established the prisoner's presence with the *British* army, nothing, but the proof of actual force, and its continuance, could excuse him from the charge of adhering to the enemies of the commonwealth. *Fost.* 11. For, joining the army of an enemy, has always been held *prima facie* evidence of an *overt act*.

And, BY THE COURT it was accordingly ruled, that evidence might be given of an *overt act*, committed in another county, after an *overt act* was proved to have been committed in the county where the indictment was laid and tried. 1778.

The Defendant was acquitted.

The *Attorney General* and *Reed* for the Commonwealth.

Wilson and *Ross* for the Defendant.

RESPUBLICA *v.* ABRAHAM CARLISLE.

THIS was an indictment for *High Treason*, which was set forth in the following words:

" The jurors for the commonwealth of *Pennsylvania*, upon their " oaths and affirmations, do present, That *Abraham Carlisle*, late " of the city of *Philadelphia*, in the county of *Philadelphia*, car- " penter; being an inhabitant of and belonging to and residing " within the state of *Pennsylvania*, and under the protection of " its laws, and owing allegiance to the same state, as a false trait- " or against the same, not having the fear of God before his eyes, " but being moved and seduced by the instigation of the devil, " the fidelity which to the same state he owed wholly withdraw- " ing, and with all his might intending the peace and tranquillity " of this commonwealth of *Pennsylvania* to disturb, and war and " rebellion against the same to raise and move, and the govern- " ment and independency thereof, as by law established, to sub- " vert, and to raise again and restore the government and tyranny " of the king of *Great Britain* within the same commonwealth; " On the first day of *January*, in the year of our Lord one thou- " sand seven hundred and seventy-eight, and at divers days and " times, as well before as after, at the city of *Philadelphia*, in the " county aforesaid, with force and arms, did falsely and traitor- " ously take a commission or commissions from the king of *Great* " *Britain*, and then and there, with force and arms did falsely " and treacherously also take a commission or commissions from " Gen. Sir *William Howe*, then and there acting under the said " king of *Great Britain*, and under the authority of the same king, " to wit, a commission to watch over and guard the gates of the " city of *Philaaelphia*, by the said Sir *William Howe*, erected and " set up for the purpose of keeping and maintaining the posses- " sion of the said city, and of shutting and excluding the faithful " and liege inhabitants and subjects of this state and of the Unit- " ed States from the said city: And then and there also mali- " ciously and traitorously, with a great multitude of traitors and " rebels, against the said commonwealth, (whose names are as " yet unknown to the jurors) being armed and arrayed in a hos- " tile manner, with force and arms did falsely and traitorously " assemble and join himself against this commonwealth, and then " and there, with force and arms, did falsely and traitorously, " and in a warlike and hostile manner, array and dispose himself

1778. "against this commonwealth; and then and there, in pursuance "and execution of such his wicked and traitorous intentions and "purposes aforesaid, did falsely and traitorously prepare, order, "wage and levy a public and cruel war against this common- "wealth; then and there committing and perpetrating a misera- "ble and cruel slaughter of and amongst the faithful and liege "inhabitants thereof; and then and there did, with force and "arms, falsely and traitorously aid and assist the king of *Great* "*Britain*, being an enemy at open war against this state, by join- "ing his armies, to wit, his army under the command of Gen. "Sir *William Howe*, then actually invading this state; and then "and there maliciously and traitorously, (with divers other trait- "ors to the jurors aforesaid unknown,) with force and arms, did "combine, plot and conspire to betray this state and the United "States of *America* into the hands and power of the king of *Great* "*Britain*, being a foreign enemy to this state and to the United "States of *America*, at open war against the same; and then and "there did, with force and arms, maliciously and traitorously give "and send intelligence to the same enemies for that purpose, "against the duty of his allegiance, against the form of the act "of Assembly in such case made and provided, and against the "peace and dignity of the commonwealth of *Pennsylvania*."

The *Attorney General* offering a witness to prove, that the Defendant had taken a quantity of salt from persons whom he termed *rebels*, as they were passing out of the city of *Philadelphia;* and that he had a power of granting passes; his Council objected, that this was impertinent to the *overt act* laid in the indictment, and therefore not admissible. 2 *Wils.* 148. 9. It was urged that at *common law*, no evidence could be given of a fact, which was not stated in the declaration. *L. N. P.* 21. 192. 3. And that this caution, with respect to the *allegata et probata*, in a civil cause, ought, *a fortiori*, to be exercised in a capital prosecution. The overt act must be particularly laid, and strictly proved. 1 *H. H. P. C.* 121. For, justice requires that the Defendant should be fully apprized of the charge, so that he may have an opportunity of encountering it with his evidence. When, indeed, one *overt act* is established, evidence may be given of another *overt act*, relative to the same treason, but not before. The only *overt act* laid in the present indictment, is taking a commission; and it is no proof of the Defendant's taking a commission, that he seized the salt in question, or possessed a power or authority to let people out of the city.—Merely to say, likewise, that he was aiding and assisting the enemy, without laying something more, is no offence; to ascertain the crime, it must be *by* joining the armies of the enemy; *by* furnishing them with provisions; *by* enlisting, *or* procuring others to enlist in their troops, or *by* carrying on a traitorous correspondence with them. The aiding and assisting is the *treason*, but these are the *overt acts*, which must be laid and proved, in order to convict the Defendant of the charge.

The *Attorney General*, in reply, observed, that by the pleadings in a civil action, the issue must be reduced to a single point; and he admitted that in all indictments for treason, an *overt act* must

be laid and proved. But, he contended, that it was unnecessary to fill the indictment with a detail of the whole evidence in support of the prosecution; for, if the charge is reduced to a reasonable certainty, it is all that justice can require, and it is all that is to be found in any former precedent. Divers *overt acts* may, also, be laid in the same indictment; and, though some of them are faulty, if one be well proved, it is sufficient to entitle the commonwealth to a verdict. Where a person was charged with compassing the king's death, evidence was allowed to be given of the prisoner's assembling with forty men, though that *overt act* was not laid in the indictment. *Fost.* 245. *id.* 9. 10. 22. As to what amounts to levying war, it is said *Id.* 216. that the joining with rebels in an act of rebellion, or with enemies in an act of hostility, will make a man a traitor. So, likewise, shutting gates against the king, or his troops, *in confederacy with enemies*, or rebels, comes within the same description of treason. *Id.* 218. and the same *overt act* may be applied to several distinct branches of treason, *Id.* 196. 7. 8. where, it appears, that Lord *Preston*'s taking boat at *Surry* stairs, with the intention of carrying treasonable papers into *France*, for treasonable purposes, was a sufficient *overt act* in *Middlesex*, to maintain the indictment there. *Id.* 217. 218. The form of the present indictment is similar to that against *Eneas M'Donald*. *Id.* 5. The charge of levying war is made in the same manner, as in the proceedings against the rebels in the year 1746. And the arraying and marching are also laid agreeably to the terms of all the precedents. 1778.

The CHIEF JUSTICE delivered the opinion of the Court to the following effect:

M'KEAN, *Chief Justice.* There are * three species of treason in *Pennsylvania: First*, To take a commission or commissions from the king of *Great Britain*, or any under his authority; *secondly*, To levy war against the state or government thereof; and *thirdly*, Knowingly and willingly to aid and assist any enemies at open war against this state, or the *United States of America.* With respect to this third species of treason, the legislature has further explained the meaning of the words, *aiding and assisting*, to be, "by joining the armies of the enemy, or by enlisting, or "procuring, or persuading others to enlist for that purpose; or "by furnishing such enemies with arms or ammunition, provision, "or any other article, or articles, for their aid or comfort, or by "carrying on a traitorous correspondence with them."—All these several species of treason are laid in this indictment.

* An act of Assembly passed the 3d December, 1782, has increased the number of treasons, by declaring, that "erecting, or endeavouring to erect a new and inde- "pendent government within this commonwealth"—and also "setting up any no- "tice, written or printed, calling the people together for that purpose," are acts of high treason. See 3 *St. Law*, 122.

1778. It is here particularly stated, that the Defendant took a commission, under the king of *Great Britain*, to watch and guard the gates of the city of *Philadelphia;* and the offence is certain enough in this description, though, without some *overt act*, it would not be sufficient for a conviction. In order to prove an *overt act*, however, evidence has been offered to shew, that the prisoner had a power of granting passes into, and out of the city, which was at that time in the posssession of the enemy. In *Fost.* 10. a witness deposed, that one *Berwick* was confined in the room assigned for the rebel officers taken at *Carlisle* by the duke of *Cumberland;* and this was deemed a sufficient proof of his holding a commission. The Court, on the present occasion, however, are of opinion, that the evidence which is offered, ought to be received, but not as conclusive proof of the Defendant's having taken a commission. Nor will the evidence of seizing the salt, or any act of disarming the inhabitants whom the Defendant called *rebels*, apply to *this* species of treason; however they may support the allegation, of his having joined the armies of the king of *Great Britain*.

We think it is sufficient, also, to lay in the indictment, that the Defendant sent intelligence to the enemy, without setting forth the particular letter, or its contents: And, though the charge of levying war is not, of itself, sufficient; yet assembling, joining and arraying himself with the forces of the enemy, is a sufficient *overt act* of levying war.

BY THE COURT:—Let the witness be sworn.

The *Attorney General* and *Reed* for the Commonwealth—*Ross* and *Wilson* for the Defendant.

The Defendant being convicted by the verdict of the Jury, his Council filed the following reasons in arrest of judgment:

1st. For that the indictment is vague and uncertain, there being no *overt act* expressly or particularly ascertained, as the prisoner is advised it ought to be.

2dly. For that the formal part of the indictment is not drawn with sufficient precision.

3dly. For that the several facts are so uncertainly charged, that the prisoner could not be apprized of the particulars urged against him. And

4thly. That the whole wants form and substance.

These reasons were elaborately discussed on the 5th of *October*, 1778, by the same Council on both sides: But, upon mature consideration, they were finally over-ruled BY THE COURT, who gave judgment for the Commonwealth; and the Defendant, a short time afterwards, was accordingly executed.

1778.

RESPUBLICA *v.* JOHN ROBERTS.

INDICTMENT for *High Treason.*—A witness was called to prove, that the Defendant had attempted to prevail upon him to enlist with the *British* army; but that he did not succeed. This gave rise to a question on these words of the act of Assembly:—"That if any person or persons knowingly and willingly shall "aid or assist any enemies at open war with this state, &c. by *per-* "*suading* others to enlist for that purpose, &c. he shall be ad- "judged guilty of high treason." 2 *State Laws*, p. 18. 19.

In support of the prosecution, it was urged, that the attempt to prevail constituted the crime; and that it was like the case of a man's sending intelligence to the enemy, which was an act equally criminal in the sender, whether the intelligence was received, or not.

For the Defendant, it was argued, that *persuading* implies *success;—suadeo* signifying to advise, and *persuadeo* to advise through, or successfully: And, therefore, it cannot properly be said of any person, that he was *persuaded*, unless he has done some act in consequence of his persuasion.

BY THE COURT:—There is proof of an overt act, that the prisoner did *enlist*, and evidence is now offered to shew, that he also endeavoured to *persuade* others to enlist, in the armies of the enemy. But we are of opinion, that the word *persuading*, used by the legislature, means to *succeed;* and that there must be an actual enlistment of the person *persuaded*, in order to bring the Defendant within the intention of the clause. 2 Lord *Ray.* 889.

The evidence offered, however, is proper to shew *quo animo*, the prisoner himself joined the *British* forces.

The Council for the Commonwealth the noffered to give in evidence, the confession of the Defendant, that he was going to the *Head of Elk*, in order to communicate some information to Mr. *Galloway*, who had at that time, gone over to the enemy.

But it was opposed by the adverse Council, who contended, that a confession, unless in open Court, had never been evidence to convict. That, though under the 1 *Edward* 6. it is said a man might be convicted of treason, by the testimony of two witnesses, or his voluntary confession; 2 *Hawk.* 256. yet, that statute does not extend to *Pennsylvania*, and by the 7 *W.* 3. *c.* 3. it is expressly declared, that no man can be indicted, arraigned, or tried, in a case of treason, but by the testimony of two witnesses, or the confession of the party made, without violence, in open Court. *Fost.* 10. 241. 2. 3. But the act of Assembly of *Pennsylvania* totally excludes a conviction by confession. See *Prin. Pen. Law*, 149. A confession may, indeed, be given in evidence to corroborate a treason that has already been established by two witnesses; but not to prove the treason itself.

1778. BY THE COURT:—To prove the Defendant's confession by two witnesses, is certainly not sufficient, under the statute, to convict him. But a confession after the fact, is proof of the *fact itself;* and though not competent alone to supply the want of two witnesses, yet it is good by way of corroboration: And, therefore, if an *overt act* has been proved in the county of *Chester* by two witnesses, the evidence now offered will be proper, in confirmation of their testimony.

One of the *overt acts*, then, laid in the indictment, is aiding and assisting the enemy by joining their armies, and this has been legally and satisfactorily proved. Notwithstanding, therefore, the other *overt act* of giving intelligence to the enemy, is not supported by any evidence, but the Defendant's own confession now offered, and which is in that respect insufficient; yet, it may be produced to substantiate another species of treason; and on that ground we now admit it to be proved. See *Foster* 10. 244. 5 *Bacon*'s *Abr.* 145. *Gregg*'s *Case.* 2 *Hawk.* 442.*

The *Attorney General* and *Reed*, for the Commonwealth—*Ross* and *Wilson*, for the Defendant.

The prisoner being convicted by the Jury, his Council moved the Court to set aside the verdict, and grant a new trial, because he was advised, "that the evidence given respecting his declarations, or confessions, was altogether illegal, and ought not to have been allowed."

After argument, by the same Council, on both sides, the motion was refused BY THE COURT, who gave judgment for the Commonwealth; and the Defendant, a short time afterwards, was accordingly executed.

* See 2 *Dall. Rep.* 86. *Ibid.* 348.

Supreme Court of Pennsylvania:

April Term, 1779.

RESPUBLICA *v.* CORNELIUS SWEERS.

AT a Court of *Oyer and Terminer*, &c. held at *Philadelphia* in *November*, 1778, the Defendant was indicted for *Forgery* upon two bills. The proceedings were removed by *certiorari* returnable into this Court, on the 5th day of *December* following; and the issues, on *not guilty* pleaded, were tried before a special jury on the 14th *April*, 1779, when the Defendant was convicted upon both indictments. Afterwards he filed reasons in arrest of judgment, of which a recapitulation will be found in the sentence of the Court; and these reasons were argued, and over-ruled, on the 19th day of the same month.

The *first* indictment was for *altering* a bill of parcels and receipt given by *Margaret Duncan*, for goods bought from her, with intent to defraud the *United States*; and the charge was set forth in the following words:

" *Philadelphia* county, ss.

" The Jurors for the Commonwealth of *Pennsylvania*, upon " their oaths and affirmations, do present, that *Cornelius Sweers*, " late of the county aforesaid, yeoman, on the 4th day of *Febru-* " *ary*, in the year of our Lord 1778, and long before, and since, " was a Deputy Commissary General of military stores, in the ar- " mies of the *United States of America*, and entrusted and employ- " ed by Colonel *Benjamin Flowers*, the Commissary General of " military stores in the armies aforesaid, and by the honorable " Continental Congress, to make purchases of military stores, and " of divers other articles, necessary and fitting in the preparation " of military stores, for the use of the armies aforesaid, and to " make payments, and take receipts, bills of parcels, and other " vouchers therefor. And the Jurors aforesaid, upon their oaths " and affirmations aforesaid, do say, and further present, that the

1779. "said *Cornelius Sweers*, on the same 4th day of *February*, in the "year aforesaid, at the city of *Philadelphia*, in the county afore- "said, having in his custody and possession a certain bill of par- "cels or account, with a certificate and receipt, all in writing, "for a parcel or quantity of flannel cloth, by him purchased of "one *Margaret Duncan*, for the use of the *Laboratory* of the same "armies, and which said writing was in the words, figures, ci- "phers and letters following; that is to say:

"*United States of America*,

"*To Margaret Duncan, Dr.*

"1778, *Feb.* 4th, To 57 & a qr. yds. flannel,	32*s.* 6*d.*	£.	83	5 7
"To 9 yds. do.	35*s.*		15	15 0
"To 107 & 3 qr. yds. do.	52*s.* 6*d.*		282	16 10
			381	17 5

"I do certify that the above was purchased and delivered to "me for the use of the *Laboratory* at *Carlisle*.

ISAAC CORAN, *Captain of the Artillery.*

"and on the back side of which said writing is indorsed and writ- "ten the words following; that is to say: Received the within "contents in full *Margaret Duncan:* He the said *Cornelius* "*Sweers*, afterwards, to wit, on the same day and year aforesaid, "at *Philadelphia* aforesaid, in the county aforesaid, with force "and arms, the said bill of parcels or writing, falsely, fraudulent- "ly, and deceitfully, did alter, and cause to be altered, by false- "ly making, forging and adding the figure 4 to and before the "figure 9, in the second *item* of the said bill of parcels or writing, "which figures and letters did, before such last mentioned forge- "ry, import and signify nine yards, but by reason and means of "such last mentioned forgery and addition, did become, import, "and signify forty-nine yards; and also by forging and altering "the figure 1, in the sum of the said second *item* in the bill of "parcels or writing aforesaid, to the figure 8; which figures did, "before such last mentioned alteration and forgery, import and "signify fifteen pounds, and fifteen shillings, but, by reason and "means of such last mentioned alteration and forgery, did be- "come, import and signify eighty-five pounds and fifteen shil- "lings; and also by falsely forging and altering the figure 3 to "the figure 4, and the figure 8 to the figure 5, in the sum total "or amount of the said bill of parcels or writing; which figures "did, before such last mentioned forgery and alteration, import "and signify three hundred and eighty-one pounds, seventeen "shillings and five pence, but, by reason and means of such last "mentioned forgery and alteration, did become, import and sig- "nify four hundred and fifty-one pounds, seventeen shillings and "five pence, with intention to defraud the *United States of Ame-* "*rica* aforesaid, of seventy pounds, of lawful money of *Pennsyl-* "*vania*, to the evil example of all others, in like case offending, "to the great damage of the said *United States*, and against the "peace and dignity of the Commonwealth of *Pennsylvania*."

The *second* indictment was for *forging* a receipt, purporting to be a receipt from one *Adam Foulk*, with intent to defraud the *United States*. It was expressed in the following words: 1779.

" *Philadelphia* county, ss.

" The Jurors for the Commonwealth of *Pennsylvania*, upon " their oaths and affirmations, do present, that *Cornelius Sweers*, " late of the county aforesaid, yeoman, on the first day of *July*, " in the year of our Lord one thousand seven hundred and se- " venty-seven, and long before, and since, was a clerk to the de- " partment of the Commissary General of military stores, in the " armies of the *United States of America*, and entrusted and em- " ployed by Colonel *Benjamin Flowers*, the Commissary General " of military stores in the armies aforesaid, and by the honor- " able Continental Congress, to make payments, and take receipts, " bills of parcels, and other vouchers, for military stores, and for " divers articles, necessary and fitting in the preparation of mili- " tary stores, purchased for the use of the armies aforesaid, and " to keep the accounts thereof: And the Jurors aforesaid, upon " their oaths and affirmations aforesaid, do further present, that " the same *Cornelius Sweers*, on the same day and year aforesaid, " at the city of *Philadelphia*, in the county aforesaid, contriving " and intending, falsely and fraudulently, to decive and defraud " the United States aforesaid, with force and arms, falsely, wick- " edly and unlawfully, did make, forge and counterfeit, and cause " to be made, forged and counterfeited, a certain writing, pur- " porting to be a receipt for one thousand and twenty pounds " and fifteen shillings, and purporting to be signed in the name " of one *Adam Foulk*, in the words and figures following, to wit, " 3 Rec'd, 1st *July* 1777, of Col. *B. Flower*, C. G. M. S. one thou- " sand and twenty pounds 15*s.* for 820 bayonet belts, and 920 car- " touch boxes for the use of the army.

£. 1020—15 ADAM FOULK.

" to the evil example of all others in like case offending, to the " great damage of the United States, and against the peace and " dignity of the Commonwealth of *Pennsylvania*. And the Jurors " aforesaid, upon their oaths and affirmations aforesaid, do fur- " ther present, that the said *Cornelius Sweers*, contriving and in- " tending the said *United States*, falsely and fraudulently, to de- " ceive and defraud, then and there, with force and arms, the " said writing, so as aforesaid falsely made and counterfeited, " purporting to be a receipt for the sum of one thousand and " twenty pounds and fifteen shillings, and purporting to be sign- " ed in the name of the said *Adam Foulk*, wickedly, unlawfully " and fraudulently, did publish, and cause to be published, as " and for a true writing and receipt of the said *Adam Foulk*; " which said falsely forged and counterfeited writing, is in the

1779. " words and figures following, to wit: " 3 Rec'd 1st *July* 1777,
" of Col. *B. Flower*, C. G. M. S. one thousand and twenty pounds
" 15*s.* for 820 bayonet belts and 920 cartouch boxes for the use
" of the army.
£. 1020—15 ADAM FOULK.

" (he the said *Cornelius Sweers*, at the time of publishing the said
" false and counterfeit writing there by him in form aforesaid,
" well knowing the said writing to have been falsely forged and
" counterfeited as aforesaid,) to the evil example of all others in
" like case offending, to the great damage of the said *United*
" *States*, and against the peace and dignity of the Commonwealth
" of *Pennsylvania*."

The prisoner being brought before the Court to receive sentence, M'KEAN, *Chief Justice*, addressed him to the following effect:

Cornelius Sweers:—After a fair and full trial, you have been convicted of the crime of *forgery*, upon two indictments, by a special jury of your country. The offence stated in the *first* indictment, is that of altering a receipt given by *Margaret Duncan;* and the charge contained in the *second* indictment, is that of forging a receipt, purporting to be the receipt of *Adam Foulk*. Your Council have taken several exceptions to the form and substance of these indictments, upon a motion in arrest of judgment.

The *first* exception was, "that, at the time of the offence " charged, the *United States* were not a body corporate known in " law." But the Court are of a different opinion. From the moment of their association, the *United States* necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In *England*, the king, lords, and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created. An indictment, however, may be sufficiently maintained upon "an intent to deceive my liege subjects;" and to that purpose there is a positive authority, not referred to by the Council, where a person was indicted, for having in his custody a piece of base metal, in the similitude of a six-pence, knowing it to be base, with intent to defraud the liege subjects, &c.

The *second* exception was, " that the charges in the indictments, " were not direct and positive, but only argumentative." On this point we cannot hesitate to declare, that the charges appear to us to be as direct and positive, as it was possible to express them.

The *third* exception was, "that the indictments do not charge " that any person was actually defrauded." But in the *King* v. *Webb*, 2 *Ld. Ray.* 1461, all the Judges declared, that if the cheat be prejudicial, that is, of such a nature as may prejudice, an indict-

ment would well lie. In the case of forgery, properly so called, which includes only records, deeds, wills, or public instruments, it may, perhaps, be necessary that some person should be actually prejudiced. This rule, however, does not extend to cheats of the present description; in which it is sufficient, that the act be of a prejudicial nature. 1779.

Upon the whole, we are of opinion, that your conviction has been legal, as well as just; and, therefore, it only remains to pronounce the sentence of the Court.

Sentence, on the first indictment:—A fine of £. 70. and imprisonment until the 4th of *July*, the anniversary of *American* Independence.

Sentence, on the second indictment:—A fine of £. 1020. imprisonment until the next annual election for *Pennsylvania*, and standing in the pillory for one hour.*

* See *post. Respublica* v. *Teischer*, 2 *Dall. Rep.* 299. *in not.* 3 *Dall. Rep.* 54.

The following appointments took place in the course of *April* and *September* Terms, 1780.

The Honorable GEORGE BRYAN, Esquire, was appointed a JUDGE of the SUPREME COURT, on the 3d day of *April*, 1780.

Jonathan Dickinson Sergeant, Esquire, having resigned the office of *Attorney General* on the 20th day of *November*, 1780:

William Bradford, junior, Esquire, was appointed *Attorney General*, on the 23d day of *November*, 1780.

Supreme Court of Pennsylvania:

April Term, 1780.

RESPUBLICA v. POWELL.

THIS was an indictment against the Defendant, a baker employed by the army of the *United States*, for a cheat, in baking 219 barrels of bread, and marking them as weighing 88 lbs. each, whereas they only severally weighed 68 lbs. The indictment being originally found at the *City Court*, in *October* Sessions, 1779, was removed by *certiorari* into this Court.

And now *Lewis*, for the Defendant, contended, that false tokens are only indictable by the st. of 33 *Hen.* 8. *c.* 1. which has no operation in *Pennsylvania;* and he cited 3 *Burr.* 1697. 1 *Burn.* 291. 2 *Sess. Ca.* 2.

The *Attorney General (Sergeant)* insisted, that the Defendant's office was a public trust; and cited 2 *Burr.* 1125. 1 *Hawk.* 187.

THE COURT said, that this was clearly an injury to the public; and the fraud the more easily to be perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not by common prudence prevent the fraud, as the Defendant was himself the officer of the public *pro hac vice*. They were therefore of opinion, that the offence was indictable.

JAMES's CLAIM.

THE case was this: *John Parrock* was attainted of *High Treason*, and his estate seized and advertised for sale. *Abel James* filed a claim, according to the act of Assembly, passed the 6*th day of March* 1778, in order to obtain a decree establishing his right, to what, he alleged, was a vested remainder in him, after the expiration of an estate for life, which, he contended, was all that *John Parrock* was possessed of in the premises, and he never had any issue.

1780. The question depended on the due construction of the following devise.—" I devise the residue of my estate to *John Parrock*, " during the term of his natural life, and if he leaves lawful is- " sue, then I give my real estate unto such issue: But, in case of " his dying, without issue, or they dying under the age of twenty- " one years, then I devise all my real estate unto *Abel James*, his " heirs and assigns, on condition that he, or they, pay the *Penn-* " *sylvania Hospital* £. 300."

After argument, the CHIEF JUSTICE delivered the opinion of the Court as follows:

M'KEAN, *Chief Justice:* The remainder in fee of this estate is claimed by *Abel James;* who alleges, that, whether the estate given to *Parrock* was for life, or in tail, he is entitled to a vested remainder in fee, which is not barred by the attainder of *Parrock*. The Court, however, are of opinion, that the word issue in this case is a limitation, and that *John Parrock* took an estate tail under this devise. Probably, indeed, no more than an estate for life was intended to have been given to him, but the law supervenes that intention. There is a second intention, manifest in the will, which is to be carried into execution; that is, that the issue should take in succession, which they could not do, without a previous estate of inheritance in the father.

The meaning of the testator appears clearly to have been, that the estate should not go over, while there was any issue, and it is expressly provided, that all must be extinct, and none have attained the age of twenty-one years, before it should pass to *Abel James*.

This is not a new case; for, it has been long settled, that the words "natural life" make no difference. *Sunday*'s Case, 9 *Co. Rep.* 127. *Helin* and *Jenings*, 1 *Freem. Rep.* 509—2 *Eq. Abr.* 312. *Ca.* 18 *Comyns*'s *Rep.* 289. 1 *Will.* 600. 754. &c. *Fortesc. Rep.* 84. 2 Ld. *Raym.* 1437. 1 *Barnard. Rep.* in *K. B.* 6. 367. Such was the decision.

As therefore, *John Parrock* took an estate tail, the land was forfeited by the attainder; and the claim of *Abel James* must be dismissed.

The claim dismissed.*

* See *Doug.* 488. *in not.*

High Court of Errors and Appeals of Pennsylvania:

April Sessions, 1780.

MONTGOMERY *v.* HENRY et al.

THIS case, which was an appeal from a decree in the Admiralty, having been elaborately argued on the 6th of *May*, the PRESIDENT delivered the opinion of the Court.

REED, *President:*—The case upon which we are now to give our judgment, comes before us under the following circumstances:—Captain *Montgomery* was master and commander of the ship, called the *General Greene*, designed for a voyage to *Martinico*. While the ship lay in the river, a severe frost happened, which occasioned a great delay, and the owners thought proper to alter their plan. Differences then arose; they dismissed Capt. *Montgomery*, and took the ship from him. Upon this he preferred his libel in the *Court of Admiralty*, complaining of the injury, as done to him in the port of *Philadelphia*, and within the jurisdiction of the Court of Admiralty. The answer of the owner to the libel is, that they had a right to remove their captain when they pleased, and that they are willing to pay him any damages he may have received by the removal.

Two general questions arise: *First*—Is the matter complained of within the *Admiralty* jurisdiction? *Secondly*—On the merits, had the owners a right to remove Capt. *Montgomery?*

The first question is subdivided into two others. *First*—Had the *Court of Admiralty* cognizance of this cause, considering the *place* where the offence is charged to have been done?—*Secondly*, Is the *subject matter* of *Admiralty* cognizance?

All the proceedings are laid to have taken place *within the port of Philadelphia*. The respondents say, that the river *Delaware* is not within the *Admiralty* jurisdiction, and to prove this, they cite Ld. *Raym.* 1453.—But, it appears to us, that, from the 12th and 15th *Rich.* 2d. the *Admiralty* has had jurisdiction on all waters out of the body of the county.—There has been great debate

1780. as to what is meant by *high seas*.—A road, haven, or even river, not within the body of the county, is *high sea*, in the idea of *Civilians*. Therefore, if the river *Delaware* is out of the body of any county, we think it clear, that it is within the *Admiralty* jurisdiction. And the Court would endeavour to enlarge its jurisdiction, rather than a place should remain subject to no control. The place where the fact was done, which is complained of as an injury, is expressly alleged in the libel, to be within the jurisdiction of the *Admiralty*.—This is not contradicted in the answer; and we must take up the matter as it stands upon the libel, not on the evidence; because there is no opportunity to traverse. On this point, therefore, we rather incline to say, the jurisdiction is well laid.

But what we found our decree upon, is the other particular, the *subject matter*.—It has been contended by the Council for the respondents, that the *Court of Admiralty* cannot carry an agreement into specific execution; and, also, that this is never done, even in a Court of Chancery, for one party, unless they could do it for the other, in case they wished for a specific performance. To this, it has been answered, that otherwise there is no complete remedy.

It was observed, by one of the Council for the respondents, that it is difficult to know in what light to consider the application in this instance. It appears to us, however, that it can be considered in no other light, than as an application to compel a specific performance of an agreement: And to shew that this can be done by a *Court of Admiralty*, *Vent.* 32. was cited; where, it appears, that a master of a vessel in *Spain* had been obliged to take on board his vessel forty butts of wine. But the determination of the *Admiralty* in *England* seems to be rather out of respect to the foreign court, than from an opinion, that they could do this by virtue of their authority originally; for, it is introduced by saying, that the judgment of a foreign court ought to be supported, even as to what might not be cognizable originally there.

It has been said that the Court of Admiralty acts *in rem*, that is, only to make the objects of dispute responsible. This, however, is a confidential trust, and we see no instances of any such jurisdiction. Does the master ship himself on the credit of the ship? No: It is no more than a contract. Whether the doctrine of mutuality of remedies be a fixed rule in the Court of *Chancery*, I am not altogether certain; but it is reasonable that the parties should stand on an equal footing. No such remedy could be obtained by the owners against the captain. It is said he might be attached if he failed of his duty;—so might the owners;—still the ship would be liable as against the owners. Indeed, I know of no case where an *Attachment* has issued, unless for some contempt; nor does *Carthew* contradict this.

If the libel is considered as complaining of a *Trespass*, instead of demanding performance of the agreement, I do not see that this will help the *Appellant*; for, an *Admiralty* Court cannot give damages.

This seems to be assigning to this Court a jurisdiction which it has not. We are, therefore, unanimously of opinion, that from the object of the libel it cannot be supported. 1780.

As to the other point, the dismission of the captain, we are of opinion, that upon a general retainer, for no particular voyage, the captain may be dismissed at any time without cause assigned; but that where there is a charter party, bills of lading, and a particular voyage agreed upon, though the owners may dismiss the captain, yet they would be liable in a common law court. Suspicions might probably be sufficient to discharge, without proofs; but, if the dismission should appear to have been a wanton abuse, the Jury would give great damages, otherwise little, or, as the circumstances might be—nothing.

We therefore affirm the *Decree with Costs.**

* See 2 *Dall. Rep.* 118.

Supreme Court of Pennsylvania:

April Term, 1781.

The Claim of JACOBS *v.* ADAMS, Executor.

THIS case had been argued on the 3d of *July* by *Lewis* for the Claimant, and *Bradford* for the estate of *Adams*. The *former* cited 2 *P. Will.* 157. 154. *Pract. Reg. Barn.* 151. 3 *Wils.* 206. 2 *Burr.* 1083.—The *latter* cited 10 *Mod.* 277. 6 *Mod.* 167.

And now, the 8th of *July*, the CHIEF JUSTICE stated the question, and delivered the opinion of the Court, to the following effect:

M'KEAN, *C. J.* The testator, *Flowers*, and *Jacobs*, entered into an agreement for the sale of certain lands; soon after which *Flowers* died, and *Jacobs* paid the purchase money to his executors. The will, however, which appointed these executors, was afterwards set aside, having been obtained by undue influence; and *Jacobs* filed the present claim to recover the money that he had thus improperly paid.

The only question submitted to the consideration of the Court, is, whether under these circumstances, interest should be allowed?

If there appeared, on the part of the executors, any thing like a *suppressio veri*, or *suggestio falsi*, our decision would, perhaps, be different from that which we have formed. But on the present complexion of the transaction, we think no interest ought to be allowed.

In *Ventris*, it is said, that no interest is lawful, and, in many other cases, that it cannot be recovered, unless given by a positive statute. When the St. of *H.* 7. c. was passed, a question arose, whether interest might be allowed pending a writ of error; and it was refused. In the case of promissory notes, however, where a day certain is fixed for payment, interest is allowed from the day of payment; and, where no day is fixed, it is payable from the time of demand. But in the instance before us, the money was received, as well as paid, in a mistake, and neither fraud or surprise can be imputed to either party. Therefore,

Let the claim be allowed for the principal sum which *Jacobs* had paid, without interest.*

* *See Henry, Ex'or. v. Risk. et al.* post.

1781.

RESPUBLICA *v.* SAMUEL CHAPMAN.

BY a proclamation, dated the 15*th June* 1778, issued by the *Supreme Executive Council*, in pursuance of the act of Assembly, passed the 6*th* of *March* preceding, for the attainder of divers traitors, &c. the prisoner had been required to surrender himself on the 1*st* of *August* following, &c. or to be attainted of high treason agreeably to that act. The time allowed for his surrender being elasped; the *Attorney General* filed a suggestion, in the usual form, stating that *Samuel Chapman* the prisoner was the person required by the proclamation to surrender himself, &c. that he had not surrendered himself, &c. that he was therefore attainted; and this he was ready to verify, &c. The Chief Justice then asked the prisoner, what he had to say, why execution should not be awarded against him.

Upon which the said *Samuel Chapman*, the prisoner, saith, *ore tenus*, that he was born, and hath ever remained and continued a subject of the king of *Great Britain*, and is now a prisoner of war; and that he is not, nor hath ever been a *subject or inhabitant* of this commonwealth; nor hath he, nor he never had, any real estate in this commonwealth; neither hath he at any time owed allegiance thereto: *Wherefore* he prays that execution may not be awarded against him, &c.

The *Attorney General* replied, that the said *Samuel Chapman*, the prisoner, was *an inhabitant and subject* of this commonwealth, &c. and that he did owe allegiance thereto, &c. *Whereupon* issue was joined.

The evidence upon the trial of this issue was, that the prisoner was born in *Bucks county* in this state, and that he had resided there *until the* 26*th day of December* 1776, at which time he departed and joined the enemy. Whether, upon these facts he was to be considered as an *inhabitant and subject* of the commonwealth of *Pennsylvania*, at the time of his departure, was the great question to be decided.

His Council argued that on the 26*th December*, 1776, there was no government established in *Pennsylvania*, from which he could receive protection; and, consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature. The doctrine of perpetual allegiance to be found in the books, applies only to established and settled governments; not to the case of withdrawing from an old government, and erecting a distinct one. Then every member of the community has a right of election, to resort to which he pleases; and even after the new system is formed, he is entitled to express his dissent; and dissenting from a majority, to retire with impunity into another country. Upon this principle, it was asserted that the prisoner never was a subject of the state of *Penn-*

1781. *sylvania;* and the following narrative of the measures pursued in organizing the constitution, was delivered in support of the assertion.

The first act of legislation, under the constitution, was passed on the 21*st January*, 1777. On the 28*th* day of the same month, the laws of the late province, with certain restrictions, were, from and after the 10*th* day of *February* then next, to be revived; and on the 4*th of March* following, the first *President* and *Vice-President* were elected; when, also, the first minutes were made on the records of the *Supreme Executive Council.* So that the prisoner's departure from this state, on the 26*th December*, 1776, was near a month antecedent to any legislative act; and near three months before *all* the branches of the government were organized and put into actual operation.—Besides, the act for the revival of the laws, expressly admits that they were not in force from the 14*th May*, 1776, until the 11*th February*, 1777: and the act for declaring what shall be treason, which did not pass till the last mentioned date, excludes every idea of retrospect; declaring only, "that all persons *now* inhabiting, &c. within the limits of the "state of *Pennsylvania;* or that shall *voluntarily* come into the "same *hereafter* to inhabit, &c. *do* owe and *shall* pay allegiance, "&c."—The prisoner, at the time of passing this act, was not an inhabitant: nor has he since voluntarily become one. He does not, therefore, owe allegiance to the state, and cannot be denominated a subject of *Pennsylvania.*—With respect to the act of the 6*th March*, 1778, on the authority of which the present proclamation issued, it is evidently an *ex post facto* law, and as such, contrary to the words and spirit of the constitution. But if the prisoner never was a subject of the commonwealth of *Pennsylvania*, this law cannot operate against him in the decision of the issue before the Court.

The Council for the prisoner cited the following authorities in the course of their argument: *Puff.* 639. *Locke on Gov.* 229. 168. 227. *Vatt.* 23. 25. *b.* 3. *p.* 109. *Burlimaqui* 27. 33. 1 *Blackst.* 45. *Foster C. L.* 55. *Harvey's case.*

The *Attorney General* stated the question to be, in fact, whether *Pennsylvania* was a commonwealth on *the* 26*th day of December*, 1776? By the declaration of Independence, on the 4*th July*, 1776, every state in the union was solemnly declared to be free and independent. But even before that period Congress had recommended, that new governments should be framed, adequate to the exigency of the public affairs; and a Council of Safety, with other temporary bodies, actually discharged the functions of the state. See *Journals of Congress* 10*th and* 14*th May*, 1776. 4*th of June*, 1776. 16*th June*, 1776. 24*th do.* and *July* 14*th.*

In consequence of the declaration of Independence, however, a *General Convention* assembled at *Philadelphia* on the 15*th July*, 1776; and on the 28*th of September* following, agreed to that social compact under which the people of this state are now united. It appears that a *quorum* of the legislative body, created by the con-

stitution thus established, met on the 28*th of November*, 1776, and then chose their Speaker and Clerk. 1 *Min. Ass.* 98. On the succeeding day the clerk was qualified, several public officers were appointed, and votes were entered into respecting the collection of fines from *non-associators*, and the enacting of a *Militia-law. id.* On the 30*th of November*, the house having made sundry orders relative to the *Militia*, adjourned till the 1*st of December*, and on the 5*th* of that month, when the house were again assembled, a committee was appointed to bring in the draft of a *Militia-law, id.* 100—With respect to the *Executive Council*, it is true, that body did not enter upon any official business, till the beginning of *March*, 1777; but its members were chosen at the same time with the members of the Legislature. 1781.

From this recapitulation, it appears, that, even before the establishment of the constitution, a government under the authority of the people was administered by councils, committees, and conventions. After the establishment of the constitution, however, the legislative (which is the sovereign) body assembled and proceeded to discharge its duties; and it was not necessary to the existence of the law, or that the government, either that they should have enacted a law, or that the *Council* should have been convened.

Under every change of the government, *Samuel Chapman* remained here till the 26th day of *December*, 1776; and, at that time, he was certainly a subject of the state of *Pennsylvania*, under the constitution agreed to on the 28th day of *September* preceding, whatever doubts may be entertained with respect to the former establishments. That this was, likewise, the sense of the Legislature, is abundantly evident from the act on which the proclamation is founded; for Mr. *Galloway*, and others, who joined the enemy in the fall of 1776, are there considered as subjects of *Pennsylvania*; and all the states are clearly deemed to have been free and independent from the declaration published by Congress on the 4th of *July* in that year.

The *Attorney-General*, to shew the definition of a nation, the relation which a citizen bears to the state, and the natural connexion between a state of society and the institution of a government, cited the following authors: *Vatt.* 92. *id. B.* 1. *c.* 19. *sect.* 212. *id. sect.* 1. *p.* 9. *id. sect.* 4. *Burlem.* 25. 1 *Black. Com.* 46. 47. 48. 213. *Vatt. p.* 15. *sect.* 26. *id.* 19. *sect.* 38.

The Chief Justice delivered a learned and circumstantial charge to the Jury. After stating the proclamation, the issue, and the evidence, he proceeded as follows.

M'Kean, *Chief Justice*:—The question that is to be decided on the facts before us, is, whether *Samuel Chapman*, the prisoner at the bar, ever was a subject of this commonwealth? The reason which has been principally urged to take him out of that description, is that on the 26th day of *December*, in the year 1776, when he withdrew from *Pennsylvania*, no government existed to which he could owe allegiance as a subject.—I shall, in the first place, consider

1781. how far this defence, under the circumstances of the case, would avail the prisoner upon an indictment for *High Treason*.

The *Attorney-General* has referred to the declaration of Independence, on the 4th of *July*, 1776, when the freedom and sovereignty of the several states were announced to the world; and also, to a resolution of Congress recommending the formation of such governments, as were adequate to the exigency of the public affairs. The sister states pursued different modes of complying with this recommendation. The citizens of *Connecticut*, *New-Hampshire* and *Rhode-Island*, considered themselves in a situation similar to that which occurred in *England*, on the abdication of *James* the second; and, wanting only the form of a Royal Governor, their respective systems of government have still been continued: while the other states adopted temporary expedients, till regular constitutions could be formed, matured, and organized.

And here it is contended, that, prior to the constitution under which we now live, the state of *Pennsylvania* was governed by a Council of Safety, and committees. But to this, it is answered, that until laws were passed by a competent legislative power, no government could be said to exist: and laws, virtually declares that from the 14th *May*, 1776, till the 11th *February*, 1777, it is inferred, that during that period, no allegiance was due, and no treason could be committed. 28th of

Although I think this point immaterial to the prisoner, since a government might have existed, and yet not be of such a nature as to affect him, it cannot be denied, that a kind of government, independent of *Great Britain*, was administered in *Pennsylvania*, antecedent to the establishment of the present constitution. The powers of sovereignty were then lodged with Congress, under whose authority a Council of Safety had been elected by the people, and were employed, in conjunction with other committees, to conduct the war, and to secure, as far as so imperfect a system could, the rights of life, liberty, and property, within this state. It is certain, indeed, that a formal compact is not a necessary foundation of government; for, if an individual had assumed the sovereignty, and the people had assented to it, whatever limitations might afterwards have been imposed, still this would have been a legal establishment. No express provision, however, has been at any time made, for defining what should be treason against those temporary bodies; but it may be well enough to observe, that treason is a crime known to the common-law.

Afterwards, we find, that a *General Convention*, elected by the people, met on the 15th day of *July*, 1776, for the express purpose of framing a new government; and during the sessions of this body, its members, collectively, assumed the powers of making ordinances, of appointing members of Congress, and of defining *High Treason*, and its punishment. All their proceedings and injunctions, except the ordinance respecting treason, were approved and exe-

cuted; and the constitution which they eventually agreed upon, was incontrovertibly a dissolution of the government, as far as related to the powers of *Great Britain*, but not in relation to the powers which had been before exercised by councils and committees. 1781.

The *Attorney General* has urged that, at least, as soon as the government under the new constitution was formed, which he says was on the 28th of *November*, 1776, the members of Council being thenchosen, and the Legislature actually assembled, the sovereignty of the state was complete, and allegiance followed by a necessary consequence, without the intervention of any positive law. But the advocates for the prisoner again object, that the government cannot be said to be established, until there is a meeting of all its parts, and that as the Executive Council never met till the 4th of *March*, 1777, the state was incapable of affording protection, and, therefore, was not entitled to allegiance before that time.

On this occasion, the sentiments of several eminent *Civilians* have been read to us; not as authorities binding upon our judgment, but as a means of information derived from the great learning and abilities of the respective writers, and, principally indeed, on account of the intrinsic weight of the reasons by which their doctrines are supported. *Locke* says, that when the *Executive* is *totally* dissolved, there can be no *treason;* for laws are a mere nullity, unless there is a power to execute them. But that is not the case at present in agitation; for before the meeting of Council in *March*, 1777, all its members were chosen, and the Legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of *high treason* might have been committed by any person, who was then a subject of the commonwealth. The act of the 11th of *February*, 1777, expressly authorizes this opinion; for, we find it there said, "That all "and every person and persons (except prisoners at war) *now* in- "habiting, &c. within the limits of this state; or that shall *volun-* "*tarily* come into the same *hereafter* to inhabit, &c. *do* owe, and "shall pay allegiance, &c." This, therefore, contradicts the idea, suggested by the advocates for the prisoner, that allegiance was not due till the meeting of the Executive Council on the 4th of *March* ensuing; and, although he cannot be convicted upon that act, yet allegiance being due from the 28th of *November*, 1776, when, as I have already observed the Legislature was convened, and the members of Council were appointed, treason, which is nothing more than a criminal attempt to destroy the existence of the government, might certainly have been committed, before the different qualities of the crime were defined, and its punishment declared by a positive law. 1 *Blackst. Com.* 46.

Having thus dismissed the preliminary question, whether the prisoner's defence would avail him upon an indictment for *High*

1781. *Treason*, I shall proceed to enquire, if there are any circumstances that take his case out of the general opinion expressed by the Court upon that point.

The act for the revival of the laws, passed the 28th of *January*, 1777, was intended, I think, merely to declare, that those laws, which were originally enacted under the authority of *George* the *Third*, ceased any longer to derive their virtue and validity from that source. But there is great inaccuracy in penning the act; for, though it would seem, by the former part of the second section, to be the sense of the Legislature, that from the 14th of *May* 1776, to the 10th of *February* 1777, the operation of all the acts of Assembly should be suspended; yet, in the close of the same section, obedience to those acts, to the common law, and to so much of the statute law of *England*, as have *heretofore* been in force in *Pennsylvania*, is, with some exceptions in point of style and form, expressly enjoined. We may, however, fairly infer from the general tenor of the act, that those who framed it, thought the separation from *Great Britain* worked a dissolution of all government, and that the force, not only of the acts of Assembly, but of the common law and statute law of *England*, was actually extinguished by that event.

This, therefore, necessarily leads to the consideration of a very important subject. In *civil wars*, every man chooses his party; but generally that side which prevails, arrogates the right of treating those who are vanquished as rebels. The cases which have been produced upon the present controversy, are of an old government being dissolved, and the people assembling, in order to form a new one. When such instances occur, the voice of the majority must be conclusive, as to the adoption of the new system; but, all the writers agree, that the minority have, individually, an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, who have not freely assented to it. What is a reasonable time for departure may, perhaps, be properly left to the determination of a Court and Jury. But whether a man should be suffered to join a party, or nation, *at open war* with the country he leaves, is a question of singular magnitude. The ground is hitherto untrodden, but there is such apparent injustice in the thing itself, that I am inclined to think, it would amount to an act of treason. *Puffendorff* 639.

This is not, however, the situation of the prisoner. *Pennsylvania* was not a nation at war with another nation; but a country in a state of *civil war;* and there is no precedent in the books to shew what might be done in that case; except, indeed, where a prince has subdued the people who took arms against him, before they had formed a regular government, which is, likewise, inapplicable here.

But this difficulty seems to vanish by having recourse to the opinion of the Legislature, in their act of the 11th *February*, 1777; for, when describing from whom allegiance is due, they speak only

of persons *then* inhabiting the state, or who should *thereafter* become its inhabitants. Hence a discrimination is evidently made between those persons, and such as had previously joined the enemy;—meaning that this election to adhere to the *British* government, should not expose the party to any future punishment. It is true, that there are not any negative words to this effect; but, taking the act for the revival of the law also into consideration, we think the design and intention of the Legislature sufficiently appears to have been, to allow a choice of his party to every man, until the 11th of *February*, 1777; and that no act savouring of treason, done before that period, should incur the penalties of the law. 1781.

This construction, it may be said, is favourable to traitors, and tends to the prejudice of the commonwealth. But we cannot be influenced by observations of a political nature in the exposition of the law: it is our duty to seek for, and to declare, the true intention of the Legislature; the policy of that intention, it is their duty to consider. The sentiments which I have now delivered, I always entertained. On the 13th of *August* 1779, the *Executive Council* had sixteen or seventeen persons in their power, who, though not attainted, were in circumstances similar to the prisoner's. On that occasion I was consulted, and gave the same opinion; but with great diffidence, owing to the novelty of the question. Those persons were, accordingly, treated as prisoners of war.

But there is yet another important point to be examined in the case before us. By an act, subsequent to all those which have been mentioned, it is declared, "that all and every person and "persons *being subjects or inhabitants of this state*, or those who "have real estate in this commonwealth, *who now adhere to*, and "knowingly and willingly aid and assist the enemies of this state, "or of the *United States of America*, *by having joined their armies* "within this state, or elsewhere, or who hereafter shall do the "same, and whom the *Supreme Executive Council* of this state, by "their proclamations to be issued under the state seal, during "the continuance of the war with the king of *Great Britain*, shall "name and require to surrender themselves, by a certain day "therein to be mentioned, to some, or one, of the Justices of "the Supreme Court, &c. and shall not render themselves ac- "cordingly, &c. shall from and after the day to them to be pre- "fixed by such proclamation stand and be attainted of high trea- "son to all intents and purposes, &c."—Under the authority of this clause, the prisoner was duly required by proclamation to surrender himself; and, therefore, his case seems to come properly within the act.

Generally speaking, *ex post facto* laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the commonwealth; and although no Legislature had previously met, yet the Assembly that passed this law, if they were impressed with the necessity of the case, had incontrovertibly a right to declare any person a traitor, who had gone over to the enemy, and still adhered to them. The

1781. validity and operation of the law, however, the prisoner is now precluded from controverting, if, at any time before the date of the proclamation, he was a subject of the state of *Pennsylvania*.

Here, then, the matter rests. Had the issue been in the *disjunctive*, the prisoner would clearly have come within the description of an *inhabitant* of *Pennsylvania;* but when the word *subject* is annexed, it means a subjection to some sovereign power, and is not barely connected with the idea of territory—it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. On this point, therefore, we must again advert to the act of Assembly, declaring what shall be treason, which has no retrospect, and to the act for the revival of the laws, which implies a suspension of all the laws from the 14th of *May* 1776, to the 11th of *Feb.* 1777. If there were no laws to be obeyed during that period, the prisoner could not be deemed a subject of the state of *Pennsylvania* on the 26th day of *December*, 1776. Whether the Legislature meant to include this case we will not positively determine;—it is a new one, and we ought to tread cautiously and securely: But, at all events, it is better to err on the side of mercy, than of strict justice.

The Jury found a verdict of *not Guilty*.*

September Term, 1781.

RESPUBLICA v. JOSHUA BUFFINGTON.

THE Attorney General filed a suggestion, stating, that *Joshua Buffington, of the county of Chester, yeoman*, being a subject, or inhabitant of the state, was by proclamation of the Supreme Executive Council, dated the 2*d of October* 1780, required in pursuance of the attainder law, to surrender himself to a Justice of the Supreme Court, &c. on or before the 13*th of November* 1780, to abide his legal trial for the treasons in the proclamation mentioned, &c. That the said *Joshua Buffington* did not surrender himself, &c. whereby he is attainted, &c. and he prays an award of execution.

* See 3 *Dall. Rep.* 54.

Joshua Buffington, the prisoner, pleaded, *ore tenus*, that he is not the *Joshua Buffington*, in the proclamation named, and was not required to surrender himself, &c.—On which the *Attorney General* replied, that the prisoner at the bar is the same *Joshua Buffington* in the said proclamation named; and thereupon issue was joined. 1781.

The proclamation being produced on the trial, it appeared, that *Joshua Buffington, now, or late of the township of East Bradford, yeoman*, was therein required to surrender himself, &c. according to the terms of the suggestion.

The evidence was this:—That on the 16*th of May* 1780, a warrant issued to apprehend *Joshua Buffington;* that about three or four weeks before the date of the warrant, the prisoner had removed from *Chester* county into the *Delaware* state; that he was born in *Chester* county, and had resided there from the year 1776, to the time of his said removal; and that he was the only person of that name in the county. On the other hand, however, all the witnesses agreed, that *Joshua Buffington* had never lived in *East Bradford*, but always in *West Bradford* township, which were distinct townships to every intent and purpose.

Lewis and *Ingersol*, for the Defendant, contended that this variance between the proclamation, and the proof, was fatal to the proceedings; and cited 2 *Haw.* 186. *s.* 119. 120. 121. *id.* 189. *s.* 121.

The *Attorney General* insisted, however, that the only questions to be determined, were, *first*, whether the prisoner is the *Joshua Buffington* whom the Executive Council intended to call upon to surrender, &c.; and, *secondly*, whether he is so described, that the description cannot apply to any other person; and he cited, *Fost.* 79. 87. 3 *Bac.* 617. 107. 103.

But, BY THE COURT:—Although it may be allowed, that the Legislature is not bound to the same strictness, that is required in the descriptions of all indictments; yet, we are inclined to think, that the Executive Council is so bound. Even in the case of a pardon, if the person intended to be benefited were named of a wrong township, the effect of the pardon would be extremely doubtful.

On the present occasion, though *Joshua Buffington* of *East Bradford* was called upon to surrender himself; yet, *Joshua Buffington* of *West Bradford* certainly was not; and there is ground for a presumption, that the prisoner did not think he was the immediate object of the proclamation.

The Court are, therefore, of opinion that the identity is not sufficiently established.

The Jury found a verdict, upon the issue, in favour of the Defendant; and he was thereupon discharged.

In *September*, 1782, however, he was tried for the offences alleged against him, and acquitted. But the Court ordered him to give security to be of good behaviour, and keep the peace, during the war with *Great Britain*.

1781.

M'VEAUGH *v.* GOODS.

CERTAIN goods of *British* manufacture being imported into the county of *Philadelphia*, contrary to the act of Assembly, passed the 10th of *September* 1778, they were attached, and this information filed against them. The owners of the goods exhibited a claim, and the merits of the case were brought to trial, at an adjourned Court, on the 10th of *January* 1782, when the following points of evidence were ruled.

In support of the information one *Scull* was called as a witness, who, being examined on the *voire dire*, said that he assisted in making a seizure of the goods; and, in case they were condemned, but not otherwise, he expected some compensation from *M'Veaugh*'s generosity, although he had received no certain promise of that kind.

Lewis, for the claimants, contended against the admission of *Scull*'s testimony; and urged that if a man, who is not, in fact, interested, apprehends himself to be so, he will naturally be biassed in favour of that side, on which he presumes his interest to lie; which is a sufficient cause to disqualify him as a witness. See *Stra.* 129.

Sergeant, for the informant, likened this to the case of an heir, who expects to be benefited by his father's estate, yet as that really depends on the will and pleasure of the father, it is no ground to prevent his being a witness. *Scull* has no certainty of reward; he has not even a promise; and, whatever may be his expectations, the matter still depends entirely on the will and pleasure of the informant.

But, BY THE COURT:—It nearly concerns the administration of justice, that witnesses should be free from every kind of bias. It is true, that *Scull* has no positive promise of a reward; but, we think, the expectation which he acknowledges, in case the goods shall be condemned, must create such an influence in his mind, as renders it improper for him to give testimony on this occasion.

Lewis offered in evidence a pass from a Justice of *New Jersey*, permitting the goods in question to be conveyed through that state.

Sergeant objected, that the pass of a Justice of *New Jersey*, could not be given in evidence to defeat an act of the Legislature of *Pennsylvania*.

To this *Lewis* replied, that it was offered merely to obviate any imputation of fraud in concealing it.

But, BY THE COURT it was declared, that the pass was not admissible as evidence.*

* 2 *Vol.* 50. 239.

1781.

RAPP *v.* LE BLANC et al.

ON an information for goods seized as *British* goods, and imported into the state of *Pennsylvania*, the following points were resolved:

1st. That the informer cannot be a witness.

2d. That, although the informer releases his right to a moiety of the goods, he cannot be a witness; because he is interested in the event; he being liable to pay the costs of the claimants, in case a verdict is found for them.

3d. That by the act of Assembly, the Judge who tries the cause not being authorized to certify, so as to exempt the informer from the payment of costs to the claimants, he cannot certify.

4th. That where the informer called a witness, who was contradicted by another witness of his own, he cannot call his first witness to disprove what the second has said.

Lewis for the Claimants—*Blair* for the Informer.

April Term, 1782.

M'DILL's Lessee *v.* M'DILL.*

A DEED executed by two persons, with one wax, and another *ink* seal, attested by one witness only, and merely proved by him before a Justice, without being recorded, was offered in evidence.

It was objected, that by the act of Assembly, 1 *St. Laws*, 78. a deed must be executed before, and be proved by, two witnesses; and that even that kind of proof was not to be received, unless the party was dead, or otherwise unable to appear and ac-

* This cause was tried at *Lancaster*, N. P. on the 18th *May* 1781, before M'KEAN, C. J. ATLEE and EVANS, *Justices*.

1782. knowledge the execution; which was not the case of the lessor of the Plaintiff when the deed was actually proved before the Justice.

To this it was answered, that the act of Assembly only related to the proof which entitled a deed to be recorded, &c. that many deeds might be given in evidence, which were not so entitled; as in the case of a long possession under an old deed. Another act declares that *one*, or more subscribing witnesses is sufficient, 1 *St. L.* 520. and it is established, that the attestation of witnesses is not of the essence of the deed. Before the *stat. of frauds*, the necessity of subscribing witnesses to any instrument, did not exist in *England;* and there is no instance in which the Legislature of *Pennsylvania* has expressly called for the attestation of two witnesses, but in that of the assignment of a bond.

By the Court:—The signing of a deed is now the material part of the execution; the seal has become a mere form, and a written, or ink seal, as it is called, is good. Any deed under seal, when proved, is proper to be given in evidence. 6 *Mod.* 45. And, we are of opinion, that a deed, the execution of which is sworn to by one witness before a magistrate, who certifies the same, is within the rule. Besides, the last act of Assembly certainly allows the proof of one witness to be sufficient.*

MORRIS's Lessee *v.* VANDEREN.

SEVERAL points of evidence were determined in this cause; which was an *Ejectment*, brought for the recovery of a lot on the west side of Second street, in *Philadelphia*.

1st. The Plaintiff, in order to shew that the persons under whom he claimed were *original purchasers* from *William Penn*, the proprietary, offered in evidence *a paper from the proprietary's, (or rather Surveyor General's) office, containing the list of names of such persons as were original purchasers;* and therein were the names of those from whom the Plaintiff derived his title. It was objected to, because the deeds themselves ought to be produced, as it did not appear that they had been destroyed. But it was answered, that the lot in question is appurtenant to a large tract of land, and that the deeds are in the possession of the owners of that large tract; for, on the settlement of the province of *Pennsylvania*, every one who bought 5000 acres of land in the country, was entitled to certain lots within the city, which became afterwards separated.

And, by the Court:—The objection is over-ruled, and the paper allowed to be given in evidence.†

* See post. *Hamilton*'s Lessee v. *Galloway*. S. P.
† See ant. 20. *Hurst* v. *Dippo*.

2d. The Plaintiff produced *the Proprietary's warrants* to make a survey of the lands in question, for a person under whom he now claimed, without shewing any actual survey, but only *a paper in the nature of a certificate from a former surveyor general, stating that such survey had been made.* It was opposed, because the present surveyor general (*Lukens*) swore that there was no such survey in the office; that surveys of other lots were wanting, and that this paper was *copied from a book in the office.* 1782.

The Court ruled, that the paper should not be given in evidence, being only the copy of a copy; but that the book from which it was taken might be read to the Jury: And it was said by M'Kean, *C. J.* that the Court has a discretionary power to admit circumstantial evidence of the existence of a record. *Aleyn.* 18.

3d. The Plaintiff offered to prove that certain deeds, necessary to make out his title, were in the hands of, and detained by, the heirs of *Israel Pemberton*, under whom the Plaintiff insisted that the Defendant was only a lessee; and also to give in evidence sundry letters written by the said *Pemberton.* It was objected, that the Defendant is not to be affected by the conduct of a third person. To which the Plaintiff's Council answered, that they undertook to prove, that the Defendant is no more than a lessee from the heirs of *Pemberton;* and the possession of the lessee, is the possession of the person entitled to the reversion. But for the Defendant it was still urged that his title is not to be made out by the Plaintiff; that he rests upon his possession; and that till the Plaintiff can make out a good title of his own, the Defendant's possession is good against him; for the Plaintiff must recover upon the strength of his own, and not upon the weakness of the Defendant's title.

But by M'Kean, *C. J.* The Plaintiff does not mean to shew the Defendant's *title*, but only his *possession*, which is admitted by the record: if *Israel Pemberton* was Defendant, it would be good evidence against him, and, if the Plaintiff proves that the Defendant is in under *Israel Pemberton*, or his heirs, he may give the detention of the deeds in evidence, and also the letters, unless the Defendant shews another title. 1 *Ld. Raym.* 311. A bill of exceptions to this opinion was tendered and allowed; but, I believe, it has never been prosecuted.

4th. The Plaintiff proceeded to call a witness to prove that the Defendant was only lessee; and it was sworn, that since the commencement of the suit (to wit, two days before the trial) the Defendant told the witness, that he held under the heirs of *Pemberton.* This testimony was objected to, because it is a general principle, not to receive evidence of any thing that happens *after* the suit. But it was answered, that this is only proof of an acknowledgment of a fact *previous* to the suit.

And by M'Kean, *C. J.* I recollect one case in the books upon this point; and that is, that an acknowledgment of a debt *after* suit, takes it out of the statute of limitations. Let the witness proceed.

1782. 5th. The Plaintiff produced the probate of a will, under the seal of the Prerogative Court of *Canterbury* in *England*, to prove title to the lots in question in those under whom he claimed; *which probate was not recorded in the office here.* It was objected, that the probate of a will is no evidence as to lands; but it was answered, that by an act of Assembly passed in 1705, it is made evidence here; and THE COURT allowed the probate to be read; though excepted to, and admitted in the bill of exceptions.

6th. The Plaintiff produced a deed executed in *England*, and recorded here; which was read in evidence.

7th. In order to prove some facts relative to the title of *Israel Pemberton*, the Plaintiff called one *Wilson*, who objected to being examined, alleging that what he knew of the matter, came to him in confidence. It appeared that *Israel Pemberton* was a merchant; that he took *Wilson* into his house when he was declining in business; that he did very little in trade afterwards; that *Wilson* used to copy deeds for *Pemberton*, and after some time (having gained experience) to draw such deeds and writings as were necessary touching his estates; that *Wilson* lived in the house with *Pemberton*, but that he had leave to draw, and did draw deeds for other people. Under these circumstances, his examination was objected to, because, it was said, that he was as much *Pemberton*'s council, as any man could be. And *Skin.* 404. 3 *Black.* 370. *Bull. Nisi Prius* 284—*Gilb. L. E.* 138. 139. were cited. It was answered, that *Wilson* was neither attorney, solicitor, or scrivener, but only in the capacity of a clerk to *Pemberton;* that the reason why the law will not allow a council, or attorney, to reveal his client's secrets, is, because a man is obliged to have recourse to professional characters in matters of law; and, therefore, the law protects the client against the danger, and the council or attorney against the indelicacy, of a disclosure. *Wilson*'s evidence, however, was dispensed with, on the Plaintiff's part; not from an apprehension, that the point could not be supported; but, as it was said by the Council, under an impression of its great importance, and a wish to avoid drawing the Court into a hasty decision; particularly as it was found the evidence could be waved without prejudice to the cause.

8th. In order to prove possession in one under whom the Defendant claimed, the Defendant offered to read a letter from *Thomas Story* dated in 1735, although *Story* himself was no way concerned in the title, to prove that he had the possession for *Radcliff Meeting* in *London.* But this was objected to, and disallowed by the Court, it being a *particular fact*, which ought to be proved by witnesses on oath, records, &c. The Defendant's Council cited *Omichund* v. *Barker.* 1 *Atk.* 21. *La. Raym.* 311. *Bull. Nisi Prius* 229. 290.—3 *Backst.* 368—2 *Wils.* 273—3 *Burr.*—1255. *Gilb. L. E.* 103. and excepted to the opinion of the Court, which was allowed in the bill of exceptions.

9th. A deed executed in *England*, and acknowledged here, *though not recorded*, was read in evidence.

It was said in the course of this cause, that no act of parliament made in *England*, *previous* to the settlement of the province of *Pennsylvania*, shall extend to the province, unless directed to be so extended either by acts of Assembly, adjudications of Courts, or established usage; and, therefore, the statute 32 *H.* 8. *c.* 9. against *embracery*, does not extend here; but the statute of limitations 32 *H.* 8. *c.* 2. does. An act of Assembly, 1 *St. Laws*, 88. proves this doctrine. 1782.

M'KEAN, *C. J.* in his charge to the Jury, laid down the following positions:

The recital of one deed in another deed, is no evidence but against the party claiming under it. *Vaugh.* 74. *Gilb. L. E.* 99.

The statute of 32 *H.* 8. *c.* 9. against *embracery*, does not make void the contract; notwithstanding the cases in 1 *Hawk.* 249. *Carth.* 251. 2 *Blac.* 290; for those cases extend only to contracts where no penalties are inflicted.

The statute of 32 *H.* 8. *c.* 9. is not in force in *Pennsylvania;* nor is the 21 *Jac.* 1. *c.* 16; but the statute of limitations of 32 *H.* 8. *c.* 2. is in force here.* This state has had her government above a hundred years; and the statute of *embracery* has never been extended either by law, or practice, during that period. It is the opinion of the Court, however, that the common law of *England* has always been in force in *Pennsylvania;* that all statutes made in *Great Britain*, *before* the settlement of *Pennsylvania*, have no force here, unless they are convenient and adapted to the circumstances of the country; and that all statutes made *since* the settlement of *Pennsylvania*, have no force here, *unless the colonies are particularly named.* The spirit of the act of Assembly passed in 1718 supports the opinion of the Court.

The statute of limitations, 32 *H.* 8. *c.* 2. has always been received in *Pennsylvania.* Fifty years possession has not been the rule; but it is agreeable to the practice that sixty years possession should be a bar.

An *ejectment* is almost the only action for trying the title to lands in this state.

The recitals of, or in, deeds, with respect to a pedigree, are evidence.

A bare perception of profits will not oust a tenant in common; and for the statute of limitations to operate as a bar, the possession must be *adverse.*

An interlineation, if made after the execution of a deed, will avoid it, though in an immaterial point; nor is it to be presumed to have been made before; the presumption is the contrary, unless otherwise proved.

VERDICT for the Plaintiff, as to *one third* of the lot in question, and for the Defendant, as to the other *two thirds.*

* *See ant. p.* 15. *Bæhm et al.* v. *Engle.*

1782.

RESPUBLICA *v.* SHRYBER *et al.*

FORCIBLE ENTRY.—In this case it was resolved, on solemn argument, that *title* could not be given in evidence by the Defendant to prevent restitution. 8 *H.* 6. *ch.* 9. 1 *Burns' Just.* 411. *sec.* 3.

And M'KEAN, *C. J.* ruled that the wife of the prosecutor might be examined as a witness to prove the *force*, but only the *force*; for, otherwise, the statutes might be eluded in some cases.

THE SAME CAUSE.

LEWIS moved in arrest of judgment, on two grounds: 1st. For that the indictment stated, "that the prosecutor was *seized* in his demesne as of fee," without saying when he was seized; so that it might be he was seized at the time of the indictment found, and not at the time of the forcible entry.—2d. For that the indictment stated "that he was *seized* in his demesne as of fee," and "his peaceable *possession* thereof as aforesaid continued until, &c." which is repugnant and inconsistent, inasmuch as he could not be both *seized* and *possessed* at the same time.

BUT THE COURT overruled both objections: And M'KEAN, *C. J.* said, that the words, "his peaceable possession thereof as aforesaid," were surplusage and ought to be rejected.*

SHRIDER's *Lessee v.* NARGAN.

IN this cause, M'KEAN, *C. J.* said, that he had ruled it in a case at *Lancaster*, that the lessor of the Plaintiff shall not be obliged to shew his title further back, than from the person who last died seized, first shewing the estate to be out of the proprietaries, or the commonwealth.

It was objected by *Lewis* and *Clymer*, that a sheriff's deed of sale of lands, under a writ of *venditioni exponas*, not being recorded in the Rolls Office, according to the act of Assembly of 1774, could not be read in evidence.—*Sed non allocatur:* Because it was acknow-

* See 1 *Inst.* 303. *n.*

ledged in Court, and the registering of it in the prothonotary's office (as is always done) is a sufficient recording within the act. 1782.

Sergeant and *Ingersol* opposed the reading a deed in evidence, upon this ground: that by the* act of Assembly last mentioned, all deeds not recorded in the Rolls Office, according to the particular directions of that act, are declared void as against subsequent purchasers; and, therefore, though this deed was dated *before* the sheriff's deed, under which the Defendant claimed, yet as it was not recorded *till afterwards*, they insisted it was void, and could be no evidence at all.—*Sed non allocatur:* And M'KEAN, *C. J.* said, we cannot hinder the reading of a deed under seal, but what use will be made of it is another thing: and he cited the case of *Ford* v. *Lord Grey*, 6 *Mod.* 44.†

WILCOX et al. v. HENRY.

THE case was this:—In the close of the year 1777, one *Stephen Backhouse* arrived at *Philadelphia* from *Liverpool*, the troops of the king of *Great-Britain* being at that time in possession of the city. *Backhouse* brought with him a large and valuable cargo of salt, which he stored in the warehouse of one *Pritchard*, and after a short stay in *Philadelphia*, he went to *New-York*, (then likewise in the possession of the *British* troops) consigning the salt to Messrs. *Jones*, *Backhouse*, and *Foulk*, of *Philadelphia*, with directions that they should sell it for him, at the best price they could get, but not under a dollar *per* bushel. *Backhouse*, one of the consignees, was no relation whatever of *Backhouse* the owner. —The consignees, accordingly, sold part of the salt to different persons, and on the 17th of *June* 1778, they sold the remainder to *Wilcox*, the Plaintiff. On the 18th of *June* 1778, (the day succeeding the sale) the *British* troops evacuated *Philadelphia*. In *January* 1779, it was seized for the commonwealth as the property of the enemy. And the question was, whether the salt was the property of *Wilcox*, the Plaintiff; or became forfeited to the state of *Pennsylvania*, as being the property of a *British* subject?

It is to be observed, that no money was paid by *Wilcox* to the consignees at the time of the sale, though the *key of the store was delivered to him.* The price of the salt was to be a dollar *per* bushel; and the agreement, at the sale, was, that if the salt should be in the city when the *American* army entered it, then the money should be paid for it within (I think) two or three months; but that if the salt should be destroyed or taken by the *British* troops, in that event, the contract should be null and void. These conditions were annexed to the agreement from a general apprehen-

* See 1 St. L. 78. 520.

† See *ant.* p. 63. *M'Dill*'s Lessee v. *M'Dill.*

1782. sion, that the *British*, on evacuating the city, would either destroy such stores as they did not want, or take with them those articles which they might stand in need of.

These facts, likewise, appeared in evidence on the trial; that the consignees had been applied to by one of the Plaintiffs five or six days before the evacuation, to purchase the salt; that for three or four weeks before the evacuation, the citizens of *Philadelphia* supposed it was intended; that the whole of the *British* army did not finally leave the city till the morning of the 18th, though their shipping, for a fortnight before, had been from time to time, dropping down the river; that the price of salt at that time was only three shillings *per* bushel; and that the Plaintiffs have since, to wit, in *August* 1778, paid the full value of the salt, at the rate of a dollar per bushel, to *Jones* and *Co.*

On behalf of the state of *Pennsylvania* three points were made: 1st. That the contract between *Wilcox* and *Jones* and *Co.* was not a complete one, inasmuch as no money was paid, nor any possession delivered of the salt. If therefore, it was not a complete contract, the salt was the property of a *British* subject, and consequently, forfeited to the state by the rules of war, and the law of nations.—2d. That admitting the contract to be complete, yet it was made to defraud the state of the forfeiture, and in contemplation of the intended evacuation.—3d. That if it was incomplete, though to be made complete by a subsequent event (to wit, the entry of the *American* army into the city, and the salt still remaining) yet the right of the state to the salt attached, if not sooner, at least, as soon (to wit, when the *American* army entered) as the right of the Plaintiffs; and that, therefore, by the rules of law, the right of the state must be preferred to the private claim.

1st *Point.* To the first point it was argued;—that all contracts should be mutual; that each of the contracting parties should have an equal remedy against the other for the performance of the contract, or for damages on the non-performance of it; that, in this case, *Backhouse* being an *alien enemy*, was entitled to no action against the Plaintiffs, but depended entirely on their liberality and honour for payment of the money, in case the salt should not be destroyed or taken away by the *British* troops.

1st *Resp. pro. Quer.* At the end of the war *Backhouse* will be entitled to his action against the Plaintiffs for recovery of the money due on the contract; because, though all rights and credits belonging to the subjects of any power at war with another, are during the war suspended, as against the subjects of that power, with whom their sovereign is at war, still on the restoration of peace, those rights and credits are revived, and the subjects of each nation, are in the same situation with respect to debts due to and from each other, as they were before the war.

2d *Point.* This was argued on both sides, from the various circumstances which appeared in the cause; the Council for the state contending, that the nature of the transaction was evidently to

trick the state out of the forfeiture, and the advocates for the Plaintiffs insisting that it was a *bona fide* sale. 1782.

3d *Point.* Many cases were cited, on behalf of the state, to shew the right of the state ought to be preferred to that of an individual, when they both accrue at one and the same time.

3. *Resp. pro. Quer.* The contract was complete, though liable to be defeated by a subsequent event; and the delivery of the salt was also complete by the delivery of the key of the store in which it was deposited. The price to be paid was, indeed, the object to be effected by the subsequent event, and not the salt itself. The distinction between a condition precedent, and a condition subsequent was taken, to shew that the property being once vested in the bargainee, could not be taken out of him, by any condition to be performed afterwards, which was impossible, repugnant, or illegal; and it was urged, that although the right of the state would have attached first, if the Plaintiffs had not obtained a prior possession by the actual delivery of the salt; yet, that having a possession before the *American army* entered, and even before the evacuation of the *British*, no such right could possibly attach.

The CHIEF JUSTICE delivered a charge to the Jury of the following purport.

M'KEAN, *C. J.* As the Council or both sides have quoted many cases, but have not appealed to the Court for their opinion on the different points of law, the Jury must take the whole together, and form their own judgment upon the subject.

When the *British* army evacuated *Philadelphia*, there was a debate in *Congress*, whether *all the property* found in the city, and belonging to the king of *Great Britain*, or any of his subjects, should appertain to the *United States*, or to the state of *Pennsylvania* only. It was at length agreed, however, that all public property, such as cannon, artillery, &c. should belong to the *United States*, and the private property of individuals should belong to the state of *Pennsylvania*.

An *alien enemy* has no right of action whatever during the war; but by the law of nations, confirmed by universal usage, at the end of the war, all the rights and credits, which the subjects of either power had against the other, are revived; for, during the war, they are not extinguished, but merely suspended. If, also, a conquered country is *ceded*, the old possessors are entitled to their estates; and when any country is *conquered*, the possessors are not deprived of their estates, but only change their masters. This is clearly the case between two independent powers, but how will the case be between this country and *Great Britain* at the close of the war? Why, had we been conquered, our lives and all our property would have been the forfeit; but even as the business now stands, the subjects of *Great Britain* may, perhaps, claim a revival of the debts due to them from the citizens of *America*, whilst we, by their acts of parliament, are debarred of the like privilege. It is hard that the people of *America* should, during the war,

1782. receive continental money for specie, and, at the end of it, be deprived of the debts due to them from abroad, whilst they are obliged to pay the debts due from them to *British* subjects. Unless some care is taken, this may be the case. I would hope, therefore, that the assemblies of the different states will think seriously of it, and, with a view it may be attended to, I have given this hint upon the present public occasion.

With respect to the case before the Court, the CHIEF JUSTICE seemed strongly with the Plaintiffs, and the Jury found a verdict for them accordingly.

Lewis and *Wilson* for the Plaintiffs—*Bradford* and *Ingersol* for the Defendant.

April Term, 1783.

KENNEDY *v.* FURY.

A CONVEYANCE was made to A. in trust for B. and B. brought an ejectment on his own demise. *Blair* contended that the demise ought to have been laid in the name of A. inasmuch as the legal estate was in him.

But by ATLEE, *Justice*, (M'KEAN, *C. J.* being absent) the demise by B. is well enough. We have no Court of Equity here; and, therefore, unless the *cestui que trust* could bring an *ejectment* in his own name, he would be without remedy, in the case of an obstinate *trustee*.

Oyer and Terminer, &c.

AT PHILADELPHIA:

September Sessions, 1783.

RESPUBLICA *v.* MESCA et al.

THIS was an indictment against four *Italians* for the murder of Captain *Pickles;* and, upon the arraignment of the prisoners, the Court assigned *Ingersol* and *Swift* as Council for them. These gentlemen then challenged the array, and moved for an award of a *tales de medietate linguæ;* but the *Attorney General* controverted the propriety of the motion, and it was twice argued, on the 25th and 29th of *September.*

The Council for the prisoners urged, that the *Stat. of Edw.* 3. *c.* 13. was a beneficial law, encouraging foreigners to come into the country; that, in practice, it had been extended to *Pennsylvania* before the revolution, and sound policy justified its continuance. In the course of their argument the following authorities were cited: 1 *Pen. Laws*, 89. 28 *Edw.* 3. *c.* 13. 4 *Bl. Com.* 352. 2 *H. H. P. C.* 271. 272. *Dyer* 304. *Chart. of Ch.* 2. *to Penn.* 2 *Wils.* 75. *Salk.* 411.

To prove the practice, *Thomas Clifford*, upon his solemn affirmation, stated, that in *February* 1764, a burglary was committed in his dwelling house in *Philadelphia;* that one *Brinkloe*, being apprehended upon suspicion, accused *William Frederick Ottenreed;* whereupon they were both imprisoned and tried; and to the best

1783. of the witness's recollection, *Ottenreed* was allowed to have a moiety of foreigners on his jury.

The *Attorney General* observed, that the question turned upon this point—how far the *English* statutes were extended to *Pennsylvania?* and by what authority they could be extended, whether exclusively by an act of the Legislature, or, likewise, by the adjudications of the Supreme Court?—The sentiments of the foreign jurists seemed, he said, to be crude and undigested upon this subject; but certain principles, which had obtained the authority of a general assent, might serve as a directory to form an accurate judgment. He then adverted to several acts of parliament which did not extend, as the act of limitations, *Jac.* 2. the 28 *H.* 8. respecting pirates, &c.; and urged, that, by the royal charter, the common law, and statute law, relating to felonies were extended; but that statutes merely relating to the mode of trial did not extend; on which account laws were passed in that respect, soon after the settlement of the province.

With respect to the statute immediately in question, he contended, that it had never been extended by the Legislature, because it was thought unnecessary, and might often be greatly inconvenient; for in every case where foreigners were tried, the humane provision of our laws, which allows them Council, would then be defeated. A trial *per medietatem linguæ* was never granted to *Indians*, or *Negroes;* nor is it, indeed, pretended to have taken place in any more than one instance; and that too rests entirely on the recollection of a single witness.

The *Attorney General* cited 2 *Hawk.* 420. *Tri. per Pais* 247. *Dyer* 357. *a. Cro. E.* 869. *Smith*'s *Hist. of New York* 24. 243. 2 *Pen. Laws.* 2. 1 *Pen. Laws in App.* 318. *Votes of Ass. Vol.* 1. *p.* 6. 53. 106. *id. in App.* 11. 1 *Pen. Laws* 88. 114. *Votes of Ass. Vol.* 2. *p.* 22. 211. 234. *Robin. View State of Europe* 395.

The CHIEF JUSTICE delivered the opinion of the Court as follows.

M'KEAN, *C. J.* The point before the Court has been well argued; and, on a full consideration of the subject, we now find little difficulty in pronouncing our decision. The first Legislature under the *Commonwealth*, has clearly fixed the rule, respecting the extension of *British* statutes, by enacting, that "*such of the* "*statutes as have been in force* in the late province of *Pennsylva*-"*nia*, should remain in force, till altered by the Legislature:" And it appears in evidence, that the 28 *Edw.* 3. *c.* 13. has been *in force* in the late province, since a trial *per medietatem linguæ* was allowed, in the case of a burglary committed by one *Ottenreed*, in the mansion house of Mr. *Clifford*.

Whether it was intended by the act, to which I have referred, to include only such statutes as were *in force*, by *an express extension of the Legislature;* or to comprehend, likewise, such statutes, as had been extended *by the judgment of the Supreme Court*, or received there in *usage*, seems to be, in some degree, uncertain.

We know, however, that many statutes for near a century, have been *practised under* in the late province, which were never adopted by the *Legislature;* and that they might be admitted *by usage*, and so become *in force*, was the opinion of the *British* parliament, declared in a statute passed in the year 1754, enabling legatees to be witnesses to wills and testaments. If, therefore, the statute in question has been, by any means, *legally in force;* a *necessity* is, seemingly, imposed upon us, to grant the challenge to the array, which has been made on the behalf of the prisoners. 1783.

But if this was a new case, the judgment of the Court would be different; for, the reasons which gave rise to the 28 *Edw.* 3. do not apply to the present government, nor to the general circumstances of the country. Prisoners have here a right to the testimony of their witnesses *upon oath*, and to the assistance of Council, as well in matters of *fact* as of *law;* which was not the case in *England* in the year 1353, when that statute was enacted. We do not think, indeed, that granting a *medietas linguæ*, will, at all, contribute to the advancement of justice; and we know it is a privilege which the citizens of *Pennsylvania* cannot reciprocally enjoy, as, at this day, there are no juries in any part of *Europe*, except in the *British* dominions.

On the ground, however, of the precedent which has been shewn, we hold ourselves bound, on this occasion, to allow the challenge, and to grant a trial *per medietatem linguæ*.

THE Honorable EDWARD SHIPPEN, Esquire, was appointed PRESIDENT of the Court of COMMON PLEAS, for *Philadelphia* County, on the 7th day of *May* 1784.

Jonathan Bayard Smith, Esquire, was appointed *Prothonotary* of the Court of COMMON PLEAS, for *Philadelphia* County, on the 25th day of *August* 1777.

Common Pleas,

PHILADELPHIA COUNTY.*

June Term, 1784.

M'CARTY *v.* NIXON et al.

THIS action was commenced returnable to the ensuing term, and now, *August* 6th, previous to the *return* of the *writ*, *the Plaintiff* moved for a special Court, under the new act, for granting special Courts *to Plaintiffs*.—*Lewis* and *Ingersol* for the Plaintiff—*Wilson* and *Wilcocks* for the Defendant.

THE COURT denied the motion, the Defendant not being in Court, nor the action depending for this purpose, till bail filed, or an appearance entered.

Ingersol in arguing on the expression in the last act, "action depending," took this distinction—Where the original writ is purchased out of Chancery, the suit cannot be said to be depending until the return; because the writ gives the jurisdiction, and before the return, the Court does not know the cause.—This is the

* As the following case may give some satsifaction to our sister states, I hope the insertion of it here, will not be deemed an improper deviation fr m my intention, to confine the reports of decisions in the *Common Pleas* to those which have occurred since the appointment of Mr *President* SHIPPEN:—particularly, as I have reason to believe, that the principle of this adjudication, met with the approbation of all the Judges of the *Supreme Court*.

Common Pleas, *Philadelphia* County.

September Term, 1781.

SIMON NATHAN *v.* the Commonwealth of VIRGINIA.

A foreign attachment was issued against the Commonwealth of Virginia, at the suit of Simon Nathan; and a quantity of clothing, imported from France, belonging

1784. case in the Common Pleas in *England*—But where the original writ issues out of the Court, returnable into the same Court, as

to that state, was attached in Philadelphia. The delegates in Congress from Virginia, conceiving this a violation of the laws of nations, applied to the Supreme Executive Council of Pennsylvania, by whom the sheriff was ordered to give up the goods.

The Council for the Plaintiff, finding that the sheriff suppressed the writ, and made no return of his proceedings, obtained, September 20, 1781, a rule that the sheriff should return the writ, unless cause was shewn.

They contended that the sheriff was a ministerial officer; that he could not dispute the authority of the Court out of which the writ issues, but was bound to execute and return it at his own peril. 6 *Co.* 54.

That those cases in England, where the sheriff was not compelled to return writs issued against ambassadors or their retinue, depended upon the stat. 7 Ann. c. 12, which did not extend to this state.

The *Attorney General*, on the part of the sheriff, and by direction of the Supreme Executive Council, shewed cause, and prayed that the rule might be discharged.

He premised, that though the several states, which form our federal republic, had, by the confederation, ceded many of the prerogatives of sovereignty to the United States, yet these voluntary engagements did not injure their independence on each other; but that each was a sovereign, "with every power, jurisdiction, and right, not expressly given up."

He then laid down two positions. First: that every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void. Secondly: that a sheriff cannot be compelled to serve or return a void writ.

I. The first point he endeavoured to prove, by considering, first, the nature of sovereignty: and, secondly, the rules of law, relative to process issued against ambassadors, the representatives of sovereigns.

He said, that all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent.

That sovereigns, with regard to each other, were always considered as individuals in a state of nature, where all enjoy the same prerogatives, where there could be no subordination to a supreme authority, nor any judge to define their rights, or redress their wrongs.

That all jurisdiction implies superiority over the party, and authority in the judge to execute his decrees: but there could be no superiority, where there was a perfect equality—no authority, where there was an entire independence.

That the king of England, as sovereign of the nation, is said to be independent of all, and subject to no one but God: and his crown is styled imperial, on purpose to assert that he owes no kind of subjection to any potentate on earth. No compulsory action can be brought against him, even in his own Courts.

That a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws.

Hence this inference was drawn, that the Court having no jurisdiction over Virginia, all its process against that state, must be *coram non judice*, and consequently void. 1 *Vatt.* p. 2. 133. 2 *Vatt.* 158. 1 *Blackst.* 141. 5 *Bac.* 450.

It was then observed, that there being no instance in our law books, of any process against a sovereign, it was proper to consider the rules of law relative to process against their representatives.

The statute of Ann. was read, with the history of the outrage that gave birth to it; which act declares that all process against the person, or goods, or domestics of an ambassador shall be null and void, and all concerned in issuing or serving it, should be punished as infractors of the laws of nations.

That this statute was not introductory of any rule, but barely declaratory of the laws of nations. That there was nothing new in it, except the clause prescribing a summary mode of punishment. That is was a part of the common law of the land before, and consequently extended to Pennsylvania. 4 *Blackst.* 67. 3 *Burr.* 1480. 4 *Burr.* 2016.

was the case in the star-chamber, and is the case in this Court, there it is *lis pendens* from the purchase of the writ—To this pur- 1784.

Hence it was concluded, that if process against an ambassador be null and void, *a fortiori*, shall it be void if issued against a sovereign?

That the true reason of the minister's exemption from process is the independence and sovereignty of the person he represents. And although by engaging in trade, he may so far divest himself of his public character, as to subject these goods to attachment, yet in every case where he represents his master, his property is sacred. But a sovereign cannot subject himself by implication: he must do it expressly.

That though the goods of a sovereign, as well as of an individual, might be liable for freight, or duties, or subject to forfeiture; yet in those cases, there was a lien on the goods, they were answerable, and the process was *in rem:* in this case, it was *in personam;* and the goods were attached merely to compel the party's appearance to answer the Plaintiff's demand. And no sovereign would submit to the indignity of doing this.

Hence it was inferred that the writ was a mere nullity.

II. Upon the second point, authorities were read to explain the case produced by the Plaintiff's Council, and to shew a distinction between an erroneous and a void writ. That the sheriff was bound to execute and return the writ, although erroneous, if the Court had jurisdiction. But when the Court had no jurisdiction, the writ was void, and the sheriff was a trespasser if he dared to obey it; a void authority being the same as none. That in England, the sheriffs were never obliged to return a writ, if upon shewing cause, it appeared that the Defendant was a public minister, or one of his domestics. *5 Bac* 431. *Salk* 700. *2 Barnes. 1 Wils* 20.

That suppressing the writ was not making the sheriff judge, because he was obliged to assign a reason for so doing: and on the legality of that reason the Court was now to determine.

He added, that if the sheriff had attached the goods, he was liable to punishment, and to compel him to return his proceedings, was to oblige him to put his offence upon record, and to furnish testimony against himself.

He finally observed, that the writ was void, or it was not. If void, the sheriff need pay no attention to it: if not void, he was obliged to execute it at all events; and if so, these inconveniences would follow. That any disaffected person, who happened to be a creditor of the United States, might injure our public defence, and retard or ruin the operations of a campaign; that he might issue an attachment against the cannon of General Washington, or seize the public money designed for the payment of his army. That the states united or several, would never submit to put in special bail (which must be done to prevent judgment) and to answer before the tribunal of a sister state.

That the Plaintiff was under no peculiar inconvenience. Every creditor of this state or of the United States lay under the same. If his demand was just, Virginia would, upon application, do what was right; if not, and flagrant injustice was done him, he might (if a subject of this state, and entitled to its protection) complain to the executive power of Pennsylvania.

He concluded with observing on the importance of suppressing such measures as the present, at their first appearance, and of preserving the rights of sovereign states inviolate—and prayed that the rule might be discharged.

The Council for the Plaintiff insisted, that though Virginia was a sovereign state, yet this ought not to exempt her property in every case from the laws and jurisdiction of another state. That sovereignty should never be made a plea in bar of justice: and that the true idea of prerogative, was the power of doing good, and not, as it had sometimes been expressed, "the divine right of doing ill."

That every person, and all property within this state, was subject to its jurisdiction, by so being within it, except a sovereign power, and the representative of a sovereign power, with his domestics and effects, which he holds as representative.

That if an ambassador engages in trade, his property so engaged is liable to attachment, *Vat. B.* IV. *sect.* 114. and if a sovereign state turns merchant, and draws or

1784. pose he cited 15 *Vin. Abr.* 127. *pl.* 3. 5. 6. 8. *Cro. Eliz.* 675. 5 *Rep.* 47. 6. 48. *a.* 1 *Vern.* 318. 3 *Black. Comm.* 316. See 10 *Vin. Abr.* 498. *pl.* 9.

accepts bills of exchange, its property ought in like manner to be subject to the law merchant, and answerable in the state where it happens to be imported

That sovereignty is better represented by persons than things: and as any or all the citizens of Virginia would be amenable to the jurisdiction of this state, if they were to come within its bounds, so there is no reason why property brought here should not be attached as well as the citizen arrested.

That one sovereign may lay duties upon the goods of another: and this appears to have been the sense of Congress, by their expressly stipulating in the articles of confederation, that no duties should be laid by one state, on the property of another.

That the goods, which were attached, were certainly liable for their freight: so if they had been imported contrary to law, they were subject to forfeiture: process against them might issue out of this Court, and jurisdiction over them be exercised, the sovereignty of Virginia notwithstanding.

That if a vessel belonging to Virginia, should be taken as prize, retaken, and libelled here, Virginia must submit her claim to the decision of the admiralty of Pennsylvania, and could not claim an exemption, on account of her sovereignty.

That a sovereign state may wave its rights—and by the very act of importing merchandise, it subjects itself to the jurisdiction of the country.

That all property in this state is under the protection of the government, and therefore should be answerable in its turn, and amenable to its laws.

That the statute of Ann. though declaratory, is only declaratory of the ideas which that parliament entertained of the laws of nations. These were often erroneous, and could not be binding on us

That whatever might be the case with regard to foreign ministers, by the articles of confederation, the delegates from Virginia were privileged only in their persons, and not in their goods: and as they represent the state, it was to be presumed, they enjoy every exemption that their sovereign expected or claimed.

They said, that whether Virginia was subject to, or exempt from, the jurisdiction of this state, in the present instance, was not the point now in question: it was only, whether the sheriff should or should not obey the command of the Court.

That by the writ, he was directed to return it to the Court, and he was not to withhold the process in contempt of this order, and to stifle the proceedings in their birth.

That the sheriff was to act under the judgment of the Court, and if he had any doubt about the validity of the writ, he ought to return it. Then the Court might, if cause was shewn, quash it as illegal.

That his not being obliged to return process against ambassadors was owing to the statute of Ann.: and this exemption was singular, and not to be extended here.

That though a writ might be void, where the Court had no jurisdiction of the cause, or issued a writ, which they had no authority to issue; yet the cause here was trespass upon the case, of which the Court may hold plea, and the process was a foreign attachment, which they certainly had authority to issue.

That to suffer the sheriff to suppress writs at pleasure, was establishing a dangerous precedent, which in future would be greatly abused

That the questions upon which this cause depended, were important, and deserved the fullest consideration: and that an appeal from one tribunal to another, was the right and the security of the subject But if the writ was now to be suppressed, there could be no record to be removed, and the Plaintiff was left without remedy.

They finally observed, that this mode of applying to a Court of Judicature, to decide on the justice of the Plaintiff's demand, was every way preferable to that proposed by the Attorney General, of sending him to complain to the executive power, who could give him no redress, but by appealing to arms, and involving the state in a war

They therefore prayed, that the rule might be made absolute.

THE COURT held the matter some days under advisement—and at their next meeting, THE PRESIDENT delivered it as the judgment of the Court,

"That the rule made upon the sheriff, to return the writ issued against the commonwealth of Virginia, at the suit of Simon Nathan, should be discharged."

1784.

HUNTER's *Lessee v.* KENNEDY.

ON motion to put off the trial of this cause, *Sergeant* tendered the affidavit of *John Adams* (who called himself the landlord of the Defendant, and declared himself interested in the suit) to prove the absence of a material witness.

Lewis and *Coxe* objected, for the Plaintiff, that the affidavit should be made by the Defendant himself.

But THE COURT received the affidavit, and ordered the trial off.

RIVERS *v.* WALKER.

IT was ruled in this cause, that notice of the time and place of the meeting of referrees, must be served on the party himself, and not on his attorney; unless it be otherwise specified in the rule of reference.

For a contrary practice, the report, in the present instance, was set aside, on motion of *Lewis*, in behalf of the Defendant, opposed by *Ingersol*, for the Plaintiff.*

CARLISLE et *ux. v.* CUNNINGHAM.

LEVY obtained a rule to shew cause, why a house which had been delivered to the Plaintiffs on a *liberari facias*, that issued in this cause, should not now be surrendered to the vendee of the Defendant, upon his bringing into Court, the principal, interest, and costs.

On the 9th of *August*, *Lewis* and *Sergeant* shewed cause, and the rule was discharged; THE COURT being unwilling to go into the matter in a summary mode, upon mere motion, and expressing their dislike of the *ampliare jurisdictionem*. The principal question was, therefore, left undetermined.†

* See 2 *Dall. Rep.* 332.

† This motion was made when house rent was rising very rapidly, and the Defendant's house, in the present instance, was extended at a very moderate valuation: the residue of the term was, therefore, a great object to both parties. I have not heard, however, of any other attempt being made by the Defendant; but, I think, the Court recommended the *Scire Facias ad computandum*, which issues in *England*, where tenant by *Elegit* holds over, after being satisfied for debt and costs.

1784.

LEIB v. BOLTON.

A MOTION was made, the 10th of *November*, on the part of the Defendant, to set aside the return of the jury of inquiry, on affidavit of irregular proceedings; and the Court granted a rule to shew cause, &c.

And now two of the jurors attended and deposed, that *Leib's* book, supported by his own oath, had been admitted as evidence of the delivery of a quantity of leather by *Leib*, to the order of *Bolton*, in part discharge of an agreement between them. But being asked, whether they founded their inquest in any degree upon that evidence, they said it was founded upon that, and concurrent testimony.

In support of the motion it was contended, that, though the admission of books in the manner above stated, had been customary; yet that the custom ought not to be carried farther than to prove work done, or wares delivered; that the purpose for which they had been introduced, on the present occasion, arose upon a collateral point, to establish a sett off in diminution of the damages, and that it was, therefore, irregular to admit them. With respect to the concurrent testimony mentioned by the jurors, it was said, that as neither the nature, or effect of it, appeared to the Court, it might have been even more improper than the allowance of the books as evidence; but that, in all events, the inquest ought to be set aside, as what did appear, shews it to have been raised so far upon an erroneous foundation.

But, BY THE COURT: We will not set aside the verdicts of juries of inquiry; nor the reports of referrees, upon frivolous grounds. Nor, will we examine into the effect of any particular piece of evidence upon the minds of the jury; for, unless it appears, that there was *no* proper evidence before them, we must presume that they had sufficient grounds for their inquest.

The Rule discharged.

Sergeant for the Plaintiff—*Lewis* and *Levy* for the Defendant. See *Cases Temp. Hard.* 381.

HAGNER *v.* MUSGROVE.

THE Plaintiff having had a verdict in the absence of the Defendant, and having agreed to withdraw it, and submit to a reference, three persons, nominated by the Court, accordingly met. Upon entering into the case, the parties, who were present, began a warm altercation, which proving troublesome to the referrees, they ordered the disputants to withdraw, and called the witnesses one after another, examining them separately out of the hearing of both Plaintiff and Defendant, and finally reported in favour of the former.

These facts being established, the report was set aside, on motion of the Defendant's Council.

Levy for the Plaintiff.—*Lewis* for the Defendant.

SNOWDEN Assignee *v.* HEMMING.

IN an action of debt upon a bond, judgment being obtained, and execution issued, *Wilcocks* moved to stay proceedings upon this ground; that though the bond was dated *in June*, the consideration, for which it was given, arose *before the 1st of March* 1781; and, therefore, he contended, that his client was within the protection of the act of Assembly passed the 27th of *December* 1784, which entitles a Defendant to a stay of execution, for a certain time, upon tendering the interest and costs to the sheriff.

Bradford, for the Plaintiff, was prepared with an affidavit to controvert the facts advanced in support of the motion; but he forbore reading it, and insisted that the Court could not travel into a consideration of the transactions for which the bond was given.

BY THE COURT:—It would occasion infinite trouble and confusion were the Defendant's doctrine to be admitted, and it is impossible to say where the mischief would end. It is true, that before a jury, proof may be made of the consideration, and of the time of delivering a bond; but this act of Assembly which, in particular cases, grants a delay of execution to the Defendant, upon the tender of the interest and costs, must, surely, at the same time, recognize the written instrument as conclusive evidence of the contract; and we can enquire no farther.*

Wilcocks took nothing by his motion.

* See 2 *Dall. Rep.* 171.

THE *Honorable* THOMAS M'KEAN, *Esquire*, L. L. D. was re-appointed CHIEF JUSTICE of the SUPREME COURT, on the 29th day of *July* 1784.

The *Honorable* WILLIAM-AUGUSTUS ATLEE, *Esquire*, was re-appointed a JUDGE of the SUPREME COURT, on the 9th day of *August* 1784.

The *Honorable* JACOB RUSH, *Esquire*, was appointed a JUDGE of the SUPREME COURT, on the 15th day of *February* 1784, in the room of the *Honorable* JOHN EVANS, *Esquire*, deceased.

Supreme Court of Pennsylvania:

September Term, 1784.

RODMAN *et al.* EX. *v.* HOOPS's Ex.

IN this cause, the Defendants offered in evidence an entry made in the books of the testator, of money paid in discharge of a promissory note. This was acknowledged to be the original entry; but there was no proof by whom it was made, or, whether the person who made it was dead, or alive.

BY THE COURT. Let it be read to the jury; not as evidence that the Defendant has paid the note, but merely that such an entry was made nineteen years ago, of the payment of a note of twenty-three years standing; and to support the general presumption of payment after such a length of time. Nor is this to be drawn into precedent; for our allowance of the evidence is founded on the particular circumstances of this case.

To prove another point in the same cause, a book was offered, in the form of a ledger, containing, in some instances, references, to a waste-book.—Notwithstanding this, it was insisted, on the one hand, to be an original, and not a transcript; but denied on the other; and the person, who, it was said, could prove it, was incapable of attending on account of sickness.

THE COURT ordered the book to be read; leaving it to the jury to determine, on the face of it, whether it was an original or a transcript; and directing them in the latter case, to pay no regard to it.

1784.

RESPUBLICA *v.* DOAN.

AARON DOAN, being attainted of a robbery in the county of *Bucks*, by process of *Outlawry*, he was brought before the Court on the 24th day of *September* 1784; and, after hearing his Council upon several exceptions to the outlawry, (which were all over-ruled) execution was awarded against him on the 9th day of *October*. The following correspondence then took place between the honourable the *Supreme Executive Council* and the judges; in the course of which several important points of law were stated and considered.*

On the 22d of *November* 1784, the President and Supreme Executive Council addressed the following letter to the Judges.

Gentlemen,

We have perused, and attentively considered, the transcript of the record transmitted by you, of the attainder of *Aaron Doan;* and as it appears to us, a case of a novel and extraordinary nature, which, being once established as a precedent, may greatly affect the lives, liberties, and fortunes, of the Freemen of this Commonwealth, we cannot, consistently with our ideas of duty, issue a warrant for his execution, until the doubts and difficulties that present themselves to our view, are removed.

To take away the life of a man without a fair and open trial, upon an implication of guilt, has ever been regarded as so dangerous a practice, that the law requires all the proceedings in such a mode of putting to death, to be "exceedingly nice and circumstantial" as *Blackstone* says; and "any single minute point omitted, or misconducted, renders the whole outlawry illegal, and it may be reversed; upon which reversal the party accused is admitted to plead to, and defend himself against the indictment." 4 *Blackstone* 315.

This liberality of spirit seems to have advanced with the improvement of the human mind, and of those laws, from which our own are composed: For, by the statute of 4 & 5 *W.* & *M.* c. 22. wisely and benevolently reciting, that, "it is agreeable to justice, that proceedings in outlawries in criminal cases, should be as public and notorious, as in civil causes, because the consequences to persons outlawed in criminal cases, are more fatal and dangerous to them, and their posterities, than in any other causes;" it was enacted, that, "upon issuing an *exigent* in a criminal case,

* As the opinions given, upon this occasion, have governed several subsequent cases, I am persuaded, it will not be thought improper to insert them here, though they do not come within the strict idea of judicial decisions.

there should issue a proclamation, according to the form of the statute made in the one and thirtieth year of Queen *Elizabeth*" &c. And the first mentioned statute was made perpetual by the 7 & 8 *W.* 3. *c.* 36. 1784.

It is our desire to regulate our conduct by the just maxims, and generous principles, that have been established, for keeping under proper directions, and restraining within proper limitations, this menacing part of jurisprudence.

We shall, therefore, be obliged, if you will be pleased to take the questions now proposed into your consideration, and to favour us with your answers.

First.—Whether the proceedings in this case are founded on common law, the act for the advancement of justice, or on any other, and what acts of Assembly, or of Parliament?

Second.—Whether there have been any, and what modern instances in *England*, prior to our Declaration of Independence, of persons being executed upon outlawry *by judicial proceedings alone?*

Third.—Whether there has ever been any, and what instance in *Pennsylvania*, of a person being executed upon outlawry *by judicial proceedings alone?*

Fourth.—Is such a mode of attainder compatible with the letter and spirit of the Constitution of this State, which establishes, with such strong sanctions, the right of trial by jury?—See section the ninth of the Declaration of rights——section the twenty-fifth of the Frame of government, &c.

Fifth.—What authorities and precedents are considered as most applicable to the present case?

Sixth.—If this outlawry is principally founded on the act for the advancement of justice, do not these words, "attainted of the crime whereof he is so indicted or appealed as aforesaid, *and* from that time shall forfeit and lose all his lands and tenements, goods and chattels;" imply by force of the copulative "and," that this forfeiture was the penalty designed to be incurred by such an outlawry; and may not the word "execution" in the following part of the clause, as it is connected with the word "trial," be reasonably applied to the other criminals there mentioned, so as to render it consistent with the preceding penal expressions? And is not this construction, *in favour of life*, strengthened by the improbability, that the Legislature of *Pennsylvania* intended to make the law in this case more sanguinary here, than the law of *England* at that period, which, it is apprehended, required one or more writs of *capias*—an *exigent*—*five exactions*—at *five different* county courts—*a proclamation at the door* of a place for divine worship, &c. before an outlawry could be incurred? *Tremaine*'s *P. C.* 281. &c.—*Statutes* before mentioned—*Hale*—*Hawkins*—*Bacon*—*Blackstone.*

Seventh.—As the person was brought into the Supreme Court by *Habeas Corpus*, ought not judgment to have been *expressly* pronounced, as the reason assigned of judgment not being pronounced "afresh," in *Ratcliff*'s case, who was brought into the

1784. King's Bench by *Habeas Corpus* is? "it having been pronounced before:" And in the cases of *Stafford*, *Bartstead*, *Okey*, and *Corbet*, who were attainted by act of parliament, (cases nearly resembling this) "the Chief Justice pronounced the *usual* judgment as in cases of high treason." *Foster* 44.

Eighth.—If all the proceedings in the present case are as rigidly exact as the law requires, in this uncommon mode of taking away life, ought Council to form a new kind of warrant for execution, thereby ordering, that on a certain day the offender be hanged by the neck till he be dead, or order in the warrant, that on a certain day execution be done upon the offender, leaving the sheriff to decide what is the punishment by law to be inflicted?

It would be agreeable to us, if you, gentlemen, would also be pleased to consider, whether the outlawry in the present case, may not be legally reversed, and the offender brought to a trial, for these defects in the proceedings.

First.—By the act for the advancement of justice it is directed, "that the *capias* shall be returnable before the *justice of that court*, where such party shall be indicted or appealed, at the Supreme or Provincial Court next after the taking of such indictment or appeal;" and that the party shall be called on by proclamation "to appear *before the said justices* at the said Supreme Court;" and it is set forth in the indictment in the present case, that it was taken at "*a Court of Oyer and Terminer and general Gaol Delivery;*" but, the *capias* in the present case directs the party to be called on by proclamation, to "appear *before the justices of the Supreme Court.*" 'Tis true, the same persons are justices of both courts; but, the title of "*that court where the party shall be indicted,*" expressly required by the act, is omitted.

Second.—It is not returned by the sheriff, that the party was called on by proclamation, "to answer *to the Commonwealth*," as by the act aforesaid, and by the *capias* is directed.

Third.—It is not set forth that the *capias* was "delivered to the sheriff three months before the return thereof," as the same act requires: Nor does the sheriff even return, that he made the proclamations *by virtue of the said capias.*

The proclamations might be made without the writ; and though it may be inferred, that they were not, ought inferences against the accused to be admitted in a case so highly penal?

Fourth.—Is not the *form* of the proclamation prescribed by the act aforesaid, and ought it not to have been strictly pursued; and does not the first line of that form require the proclamation to begin with a setting forth of the indictment?

Fifth.—Ought it not to appear, *when*, and how, the party was "*for the cause aforesaid* BEFORE committed to the custody of the sheriff of the city and county of *Philadelphia*," or at least, that it was *subsequent* to the proclamations in *Bucks* county?

Sixth.—The act beforementioned, and the *capias*, order the sheriff to "*make* proclamation *in* every Court of Quarter Sessions," &c.

but the sheriff returns that he "*caused* public proclamation to be made *at* two several Courts of quarter sessions," &c. The word "*at*" is uncertain. So is the word "*public*." Neither of them is used in the act. The requiring "*the sheriff to make* the proclamations," appears to have been intended to oblige his attendance in person at so solemn a transaction, leading to such fatal consequences. It is not returned, that he was *present*. As to the other words, proclamations might be in some sense said to be "public," and "at the Courts," and yet not "in the Courts." Where life depends on proclamations, it seems scarcely possible to adhere with too scrupulous an exactness to injunctions positively directed by law, for giving them their destructive efficacy. 1784.

Seventh.—It does not appear by the return *who* was called on by proclamation to appear.

The offender has represented to us by petition, that, at the time when the outlawry was sued forth against him, he was in *New York*, then in the possession of the *British* army. What regard ought to be had to that circumstance, you, gentlemen, can determine.

I am with respect,
Gentlemen,
Your most obedient
And very humble servant,
JOHN DICKINSON.

To these enquiries the following answers were returned, addressed to his Excellency the President in Council, on the 15th of *January* 1785.

Sir,

We had the honour of receiving on the 29th of *November* last, the letter from your Excellency, and the honourable the Supreme Executive Council, dated the 22d of the same month, respecting the case of *Aaron Doan*, who stands attainted of a robbery in the county of *Bucks*, by *outlawry*, and against whom execution has been awarded. In this letter the Council express difficulties with regard to their issuing the warrant for his execution, and have desired the opinion of the judges on nine several questions. Before we gave our answers to these questions, it was expected that all the judges might consult together, in Court upon them; but, as we now despair of this for some months, we shall offer what we think may be material on the occasion without further delay.

Previously to the giving our answers, we beg leave to observe, that the judges do not hold themselves bound to assign any reasons for their judgments; and when they do give reasons, it is always *in public*.* This is mentioned, that the present proceeding may not be drawn into a precedent.

* Kel. 54.

1784. We would next observe generally, that on outlawry for felony, is a *conviction and attainder* of the offence charged in the indictment, and has been as long in use as the law itself. The intention of it was to compel all men to submit to the laws of their country, and to prevent their escaping justice, by flying, and staying away, until all the witnesses are dead. It is a very important part of the criminal law; and we do not find an occasion, where any question of law, upon a writ of error to reverse an outlawry in a *criminal* case, ever undergone a *serious* litigation, before that of *John Wilkes*, Esquire, in 1770.*

If there be any thing improper in taking away the life of a man upon an attainder by a judicial outlawry, it belongs to the Legislature to alter the law in this particular; the judges cannot do it. But Council can interpose their mercy.

In our answers, we shall refer to the questions, in the order they are placed in your Excellency's letter, without inserting them here.

ANSWERS TO THE QUESTIONS.

First. The proceedings in this case are founded on the act of Assembly, entitled, "An act for the advancement of justice, and more certain administration thereof."

Second. Our law books do not inform us, except very rarely, of the executions of capital offenders; they are generally to be found in the histories of the times, or in the periodical publications; and, therefore, we cannot mention with certainty any modern instances in *England*, prior to our Declaration of Independence, of persons being executed upon outlawry *by judicial proceedings alone;* but Lord Chief Justice *Mansfield*, in *Wilkes*'s case, expresses himself thus: "*Flight*, in *criminal* cases, is itself a crime. If "an innocent man flies for treason or felony, he forfeits all his "goods and chattels. Outlawry, in a *capital* case, is as a *conviction* "for the crime: And *many men, who never were tried, have been* "*executed upon the outlawry*." 4 *Burrow*. 2549.

Third. We do not know of any instance in *Pennsylvania*, of a person being executed upon outlawry *by judicial proceedings alone:* But a certain *David Dawson* was executed, since the Declaration of Independence, in consequence of an attainder by virtue of a proclamation of the Supreme Executive Council, *and judicial proceedings thereupon*. In that case, the Court awarded execution, by pronouncing the usual *sentence* of death: no judgment having been given *before*.

Fourth. We conceive, such a mode of attainder compatible with the letter and spirit of the Constitution of this state, and that it is no infringement of the *right* of trial by jury; for, that the party had not that trial, was owing to himself; he was not de-

* See 2 *H. H. P. C.* 205. 207. &c. 4 *Burr.* 2541. 2549. 2 *Hale* 208. 4 *Burr.* 2551.

prived of the right. As well, indeed, might an offender, who confessed the fact in Court, by pleading guilty to the indictment, after sentence, complain that he had not a trial by jury. By refusing to take his trial, he tacitly seems to have admitted himself guilty. 2 *Hawkins*, *fo.* 170. *chap.* 23. *sec.* 53. 2 *Hale* 208. 1784.

Fifth. We conceive, all the authorities and precedents of outlawries in *capital* cases at common law in *England*, as applicable to the present case; there being no difference, but in the form and manner of proceeding to the outlawry, which is made by the before-mentioned act of Assembly.

In particular we would refer Council to 4 *Burr.* 2527 and to 2577, where almost all the authorities are collected together and fully considered.

Sixth. In the act for the advancement of justice, &c. *sec.* 17. the Legislature have declared, "that the party indicted of a capital offence, not yielding his body to the sheriff at the return of the *capias*, shall be, by the Justices of the Supreme Court, pronounced *outlawed*, and *attainted* of the crime whereof he is so indicted. And from that time shall forfeit all his lands and tenements, goods and chattels: *which forfeiture*, &c. after debts paid, shall go, one half to the Governor for the time being, &c. and for defraying the charges of prosecution, trial and *execution* of such criminals." Had the clause ceased at the end of the words "attainted of the crime whereof he is so indicted," no doubt remains with us, but that the party was liable to suffer all the pains of death prescribed by law for the offence specified in the indictment; and the words following, so far from altering this construction, in our opinion, shew, by the most necessary, evident, and strong implication, that the party was liable also to be *executed;* for the expences of the *execution* are to be defrayed out of his forfeited estate.—We therefore have no doubt, that *Aaron Doan*, besides the forfeiture of his estate, has forfeited his life.

Seventh. We conceive, that, where a person is attainted by an act of Parliament or Assembly, and is brought before the Court, and execution awarded, the practice *most generally* has been to do so, by pronouncing the *express* sentence; and the reason given for it, is, because no *judicial* sentence had been pronounced *before;* but in case of an outlawry by *judicial proceedings only*, no *express* sentence is given upon the party's being brought before the Court, but merely an award on the roll, *that the sheriff do execution at his peril*, or *execution awarded by the Court;* because a judgment had been given *before*. Judgments in criminal cases are divided into two kinds—1. By *express* sentence to the punishment proper for the crime. 2. Judgments without *any such sentence*. Of the *latter* there are two kinds. 1. Outlawry. 2. Abjuration. Judgment of outlawry in *England* is given by the *coroner*, and is in these words, "Therefore the said A. B. by the judgment of the coroner of our Lord the King of the county aforesaid is outlawed." The party is thereby as much attainted,

1784. and shall forfeit and lose as much, as if sentence had been given against him upon a verdict or confession. *Finch of Law*, 467. 3. *Inst.* 52. 212. *Cro. Coro.* 266. &c. And after such outlawry, if the party is brought before the Court of *King*'s *Bench*, "execu- "tion shall be awarded against him, *but no sentence pronounced*, "because the outlawry is a *judgment*, and no man shall have two "judgments for one offence." 2 *Hawk. chap.* 48. *sec.* 23. *fo.* 447. and the cases there cited. But in the present case, the judgment was pronounced before *by this same Supreme Court*, that *Aaron Doan* is *outlawed and attainted of the crime whereof he is indicted*, and we do not think, that it would have been formal to have given a second express judgment. This matter was mentioned, and well considered by the judges, at the time they awarded execution in the present case of *Aaron Doan*.

Eighth. The judgment against *Aaron Doan* is, *that he is outlawed and attainted of the crime whereof he is indicted*—The record shews that he was indicted of a robbery; in which case, the express judgment is, "that he shall be taken back to the place from whence he came, and from thence to the place of execution, and there be hanged by the neck until he is dead." The judgment of outlawry implies all this. We therefore think, that a warrant for the execution may properly issue, giving these special directions to the sheriff. We find, that executions have been commanded to be done by the Court *without writ*, sometimes by *writ*; and that the king in *England* has, by special warrants, frequently remitted part of the punishment and directed the rest, and changed hanging for beheading, though some have doubted of his authority to do so, in the latter instance. 2 *Hawk. chap.* 51. *sec.* 4. 5. *fo.* 463. *Finch of Law*, 478. 3 *Mod.* 42. *Cro. Jac.* 496.

Ninth. We do not think, that the *outlawry*, in the present case can, at this stage of the business, be legally reversed. The several critical and verbal objections, now stated by Council, as well as most of those preceding, were made at the bar, in behalf of the prisoner, by his Council learned in the law, answered by the prosecutor for the Commonwealth, and over-ruled by the Court, upon full discussion and mature consideration. The Court cannot *make* errors, nor reverse for errors which do *not exist*, or which they *cannot see*: They must be satisfied, that there *are errors*. There may, perhaps, be some small mistakes in the *transcript* of the record by the Prothonotary, as we have not seen it, but there is no error in the record itself, that we have been able to discover. There has never been a question seriously litigated in *Westminster Hall* upon a writ of error to reverse an *outlawry* in a *capital* case. Such a writ was never granted, but from justice, where there really was error, or from favour, where the king was *willing* the *outlawry* should be reversed: They are grantable merely *ex gratia regis*, and when granted, there never was any opposition made, and the Courts reversed them upon *slight and trivial* objections, which could not have prevailed, if opposed, or the precedent had been of any consequence; which could not be,

as the king had the power to *refuse* the writ. All was by consent of the king, and the reversal took place, though there was really *no error at all.* 1784.

It is as much a breach of duty, to reverse a good, as it would be to affirm a bad outlawry. The mischief goes farther than an unrighteous sentence in the particular case; for, to reverse without an error, is to abolish that part of the law.

Your Excellency further informs us, that the offender has alleged in his petition to Council, that he was in the city of *New York* at the time the outlawry was sued forth against him. In answer to this, we can only say with certainty, that if he had put any material fact in issue, it would have been tried.

Upon the whole, three indictments for robbery have been found against him in *Bucks* county; by the examinations of *Jesse Vickers*, *Solomon Vickers*, *John Tomlinson*, *Israel Doan*, *Joseph Doan*, &c. he was a principal in them, and eight or nine others in that county, and the counties of *Philadelphia*, *Chester* and *Lancaster*; he has been duly outlawed for one of them, and execution legally awarded, according to our judgments.

We have the honour to be, with the greatest respect,
Sir, your Excellency's and the Council's,
Most obedient humble servants,

THOMAS M'KEAN.
GEORGE BRYAN.
JACOB RUSH.*

HAMILTON's Lessee v. GALLOWAY.

A DEED proved by the affidavit of one of the witnesses before a Justice of the Court of *Common Pleas*, but not recorded, was offered in evidence.

It was objected, however, that this attestation is no proof of the deed at *common law*, unless it be an ancient deed, and possession is proved to have gone along with it; for, the witness ought to appear in Court.—Nor is it admissible under the *Act of Assembly*, for that expressly requires it to be recorded.

Yeates answered, that the point had already been ruled in *M'Dill* v. *M'Dill*.†

And, By the Court: The deed may be read in evidence; for, the recording does not contribute to the proof of the deed,

* Since the publication of these Reports, the Reporter has been favoured with the reasons, offered to the Supreme Executive Council, in reply to the opinion of the Judges, by Mr. Dickinson, the President. A duty to the public would sufficiently justify the insertion of this important document, that the subject might appear entire: but, I confess, that I am actuated by the additional motive of paying a tribute of respect to the wish of one, who has done honour to his country, to his profession, and to his species. The document will be found in the *Appendix*.

† Ant. 63.

1784. which is established by the oath before the justice; the recording only gives the deed a special operation by the express provisions of the act of Assembly.*

BURKE's Lessee *v.* RYAN.

EJECTMENT.—On the trial of this cause, in deducing the Plaintiff's title, a sheriff's deed was produced, but no part of the record recited therein.

Sergeant contended, that if the title was set forth, it was necessary to prove every part of it; that between the parties, the *fi. fa.* and *Vend. Exp.* may only be shewn; but that against a stranger, the pleadings, verdict, and judgment, ought to be produced. *Gilb. L. of E.* 9. 10.

On a question from the opposite Council, *Sergeant* admitted that in *New Jersey*, it was not the practice to produce more than the sheriff's deed; but insisted that, of late, it had been frequently required, and that in strictness, it was indispensably necessary.

But, BY THE COURT:—As the possession has gone more than twenty years along with the deed, it is unnecessary, in this case, to require farther proof. And the CHIEF JUSTICE added, that within his knowledge, it had not been customary, in any case, to produce the record.

Lewis and *Mifflin* for the Plaintiff.—*Sergeant* for the Defendant.

HIGHT *v.* WILSON.

THIS was a feigned issue to try the validity of a will, against the probate of which, a *caveat* had been entered in the Register's Office. The plea was insanity in the testator; and evidence was given of habitual drunkenness, old age, weakness of body, shortness of memory, and a few incoherent expressions. The Jury, however, in a very short time, gave a verdict for the Plaintiff in the issue, who was the devisee in the will.

The CHIEF JUSTICE, in his charge to the Jury, informed them, 1st. That it was not necessary that a will, devising real estate in this Commonwealth, should be sealed. 2d. Nor that all the subscribing witnesses should prove the execution. 3d. Nor that the proof of the will should be made by those who subscribed as witnesses. 4th. Nor that the will should be subscribed by the witnesses.†

* This cause was tried at *Carlisle*, N. P. on the 24th of *May* 1784, before M'KEAN, *C. J.* ATLEE and RUSH, *Justices.*

† See *post. Lewis* Appellant v. *Maris* Appellee.

High Court of Errors and Appeals of Pennsylvania:

September Sessions, 1784.

TALBOT qui tam, &c. v. The COMMANDERS and OWNERS of three Brigs.*

"THIS cause was of great consequence, not only on account of the property depending on its decision, but because the following questions were determined upon solemn argument. *First*, That the owners of *Letters of Marque* are responsible for injuries committed on the high seas, by the commanders of vessels sent out by them, at least, to the value of the vessels. *Secondly*, That in cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made. *Thirdly*, That the Judge of the Admiralty for this state, may legally take cognizance in causes similar to this. *Fourthly*, That the appeal in such cases to the High Court of Errors and Appeals for this state, is regular."†

It was an appeal from a decree in the *Admiralty* on the following case:—*Silas Talbot*, commander of the armed sloop *Argo*, belonging to, and in the service of these states, duly commissioned, sailed from *New London*, in the state of *Connecticut*, the twenty-ninth of *August* 1779, on a cruise. On the *sixth* of *September*, after an engagement of three hours, he took as prize upon the high seas, an armed letter of marque vessel, called the *Betsey*, of two hundred tons burthen, with a valuable cargo, belonging to subjects of *Great Britain*, not being inhabitants of *Bermuda*, and bound for *New York*, then in possession of the *British* naval and land forces. He took the commander and eleven of the people out of the prize, leaving three in her, and put on board a prize-master and eleven other hands, with instructions to proceed to *New London*. The firing was heard, and the engagement for more than an hour seen by persons on board three letter of marque brigs that had lately sailed from *Philadelphia*. During the engagement the *Betsey* was perceived from the three brigs, bearing towards them. Her surrender was also seen from on board them. The prize-master in obedience to his instructions, proceeded on his voyage in company with the *Argo* for *New London*. Some time after the three brigs were discerned from on

* For the decree in the *Admiralty* in this case, and the evidence upon which it was principally founded, I beg leave to refer the reader to a small volume of Reports of Cases in the Admiralty of *Pennsylvania*, published by the Honourable *Francis Hopkinson*, Esquire, the Judge of that Court; and printed by *Dobson* in *Philadelphia*. In this book will, likewise, be found several important decisions upon questions of *Hypothecation*.

† To understand the arguments in this cause, it may be necessary to premise, that the Council for the Respondent contended, that the appeal lay to the Court of Appeals, instituted by the United States; and the Council for the Appellants, that the Court of Admiralty for this state had no jurisdiction in this case.

1784. board the *Betsey*. Towards evening they chased the *Argo* and *Betsey*. The next day, early in the morning, the prize being in tow of the *Argo*, the three brigs were seen from on board the prize, and the *Argo* chasing them. The brigs approached fast under *British* colours. Captain *Talbot* finding it impracticable for the prize to escape, with a trumpet hailed her, directing the prize-master to throw off the rope, and lie too with the prize, until the three brigs should come up with her, adding, that he with the *Argo* would run a little to leeward and lie too also—and that if the brigs should prove to be *American*, the prize-master should endeavour to obtain permission for the prize to come down by herself and inform him of the brigs being friends. In a short time the brigs came up, and from one or two of them under *British* colours, the *Betsey* was fired at twice, she then bearing *British* colours reversed, according to the custom of prizes, and being in the latitude of 39 degrees 4 minutes, and the longitude of 71 degrees 24 minutes. When first hailed, the people on board the *Betsey* answered, she was from *Montserratt*. Persons from two of the brigs, one of which had fired at the *Betsey*, boarded her. Among these was W. D. from the last mentioned brig. The commander of this brig was informed by the prize-master on board the *Betsey*, that she was a prize to the *Argo*, commanded by Captain *Talbot;* that the vessel then in sight was the *Argo;* that he was put on board the *Betsey* as prize-master by Captain *Talbot;* he shewed him his written instructions as such; but said the *Betsey* had been taken three days before. W. D. from on board the *Betsey*, told the said commander, that the prize-master denied having seen the brigs the day before, or that she was then captured; but from every circumstance, and from the report of one of her *English* sailors, he was convinced, she was the same vessel seen engaged the day before. On board the brig, to the commander of which this information was given, were a boatswain and sail-maker, who had been taken by Captain *Talbot* about ten days before in a vessel from *London*, and sent by him prisoners to *Philadelphia*, and shipped there. One of the persons put into the *Betsey* by Captain *Talbot*, knowing them, mentioned this fact in conversation on board the said brig, to W. D. The person thus put on board by Captain *Talbot* also said, that the *Betsey* had been taken three days before. The papers on board the *Betsey* were examined by W. D. in behalf of the three brigs, and the number of names specified in the *English* papers, was found to correspond with the number of persons then on board. From these papers it appeared, that she was a *British* vessel bound from *Montserrat* to *New York*. W. D. made several other examinations on board the *Betsey* on behalf of the three brigs, and in the course of them was informed by a seaman who belonged to her while possessed by the *British*, that she was taken the day before. This sailor also said, she sailed from *Montserrat*. Before W. D. left *Philadelphia*, he had heard in the coffee-house there, a few days before he sailed, that the *Argo* a *New Eng-*

land privateer had taken the *Dublin* cutter, fitted out full of men of war's men. While these examinations were made, the two other brigs chased the *Argo*, under all sail, upon which Captain *Talbot*, concluding they must have been *British* cruisers, made sail before the wind, and soon left them. The commanders of the three brigs took the prize-master and hands out of the *Betsey*, who were carried to *Spain*, except one or two of the least considerable, and also took out of her two cannon, small arms, powder, ball, two coils of cordage, and some other articles. They then put a person on board her as prize-master, and men from each of the brigs, with written orders, dated the 7th of *September* 1779, and signed by them all, directing him to "take charge of her as prize to the brigs *Achilles*, *Patty*, and *Hibernia;* carry her into *Delaware*, *Chesapeak*, *Egg-Harbour* or *Boston*, but to get her if possible into *Delaware*, *Chesapeak*, or *Egg-Harbour*, for fear of the sloop *Argo*'s falling in with her, begging him to stand to the southward that night, and strive hard for *Philadelphia*." These orders were signed on board the brig, the commander of which had directed the examinations before mentioned on board the *Betsey*. The *Betsey* sailed off close by the wind to the southward, was afterwards retaken, carried into *New-York*, and restored to the former owners. On the 17th of *September*, 1779, Congress resolved, "that in consideration of the distinguished merit of Colonel *Silas Talbot*, a commission of Captain in the navy be given him, and that the marine committee be directed to provide a proper vessel for him as soon as possible." On the *first* of *March*, 1780, Congress resolved, "that any interest *The United States* may have in the capture of the *Betsey* by the sloop *Argo*, Captain *Silas Talbot*, be relinquished to the said Captain, and the officers, seamen, and marines, under his command at the time of the capture." On the 13th of *March*, 1780, Captain *Talbot*, qui tam, &c. filed his bill in the Court of Admiralty for this state, against the three brigs, their owners and commanders. Process issued accordingly. On the 27th the owners came severally before the Court, and entered into stipulations for the performance of the decree. *August* 29th, a plea to the jurisdiction filed, "for that in cases of *damages* to be assessed or recovered to make satisfaction for a wrong or trespass to person or property, the prosecutions ought to be in Courts of Common Law." Replication, "that the cause of action was within the jurisdiction of the Admiralty." Plea dismissed, *Respondeant Ouster* awarded, and plea of *Not Guilty* filed. *July* 19th, 1783, decree, that the Libellants have and recover of the Respondents £12,791 5 0 with costs, and on the 22d the Respondents appeal. 1784.

The cause was ably argued on several days, and now, at an adjourned sessions, held the 14th of *January* 1785, the PRESIDENT delivered the resolution of the Court.

DICKENSON, PRESIDENT:—There are two principal questions concerning jurisdiction in this cause.

1784. *First.* Whether the Court of Admiralty for this state had jurisdiction?

Second. Whether this Court has jurisdiction?

The first has been subdivided into these *secondary* questions:

First. Could the Court of Admiralty for this state take cognizance as an *Instance* Court, supposing this cause not to be a cause of *prize?*

Second. Did that Court take cognizance as a *Prize* Court?

It is acknowledged by the Council for the Appellants, that if this is not a cause of *prize*, the Court of Admiralty might take cognizance as an *Instance* Court, it being now settled that damages may be assessed in the Admiralty—if it was not for an objection arising from the Act of Assembly for regulating and establishing admiralty jurisdiction in this state. By that Act the Judge of the Admiralty shall "have cognizance of all controversies, suits, and pleas of maritime jurisdiction, *not cognizable at the common law*, and thereupon shall decree as the maritime law, the law of nations, and the laws of this commonwealth shall require." The objection made, is, that the present controversy *is cognizable at common law.*

It is manifest from this Act that in framing it, the Legislature took into consideration the *English* statutes relating to things done upon the high seas, and particularly the statutes of the 13th of *Richard* the *second*, ch. 3, and 5, and the 2d of *Henry* the *fourth*, ch. 11. by which, "Admirals and their deputies are prohibited from meddling with any thing done within the realm of *England*, but only with things done upon the seas, according to that which hath been duly used in the time of *Edward* the *third*," and it is "declared, that the Court of the Admiral hath no manner of conusance, power, or jurisdiction of any contract, plea or quarrel, or of any other thing done or rising within the bodies of counties, except in cases of death or *mayhem* done in great ships being in the main stream of rivers beneath the *points of the same."

It is clear even from these cautions against encroachments of the Admiralty upon the courts of common law, and from the well-known dispute mentioned in *Cook*'s 4*th Inst.* that the jurisdiction of that Court, as to "things done upon the sea," is acknowledged to be *proper:* and, that as to *them* the jurisdiction of the common law courts was *not proper*, but only acquired by a *fiction* in supposing them to have been done in the same county, when they were not. 4 *Inst.* 134 to 143. 3 *Blackst.* 43, 106, &c. *Fortescue* de Laudibus 67. *et in notis.* The common law courts had a great advantage. They used it. There was no superior court to *prohibit* them. They went beyond the "*Credo quia impossibile est;*" for they upon certain suggestions, *without* "*believing*" them, but *knowing* them to be both *false* and *impossible*, assumed jurisdiction;

* Doctor *Zouch*, in his "Jurisdiction of the Admiralty," p. 85. urges strong reasons against this construction; and in *Owen*'s Reports, p. 122. it is said by the Court, that the statute of the 15th of *Richard the 2d.* is misprinted. For the translator mistook bridges for points, that is to say the Lands-End.

and would not permit *evident truth* to be regarded. With such laboured ingenuity has the jurisdiction of common law courts, as to acts upon the high seas, been sustained, to the great mortification of Sir *Thomas Rydlye* and other learned Civilians,* the former, with much commendation from the rest, very gravely undertaking to prove, that a ship could not sail in *Cheapside* in the city of *London*,† the place usually assigned in suggestions, as the scene of naval transactions. 1784.

Yet, notwithstanding these statutes, mariners have in *England* been allowed to sue for wages in the Admiralty, upon contracts made there within the body of a county, "against the statute *expressly*," as was held by the Judges, when that great man, Lord Chief Justice *Holt*, presided in the King's Bench. *Salk.* 33. The reasons were, that the remedy was *easier*, because they could join in the suit, and *better*, because the ship would be answerable.

In the present case, the owners, masters and sailors of the three brigs could not be jointly sued at common law. If they could not, what a multiplicity of actions must be brought? Supposing the owners, commander and men of the *Argo* could join in a suit at common law, one of them might destroy the action by a‡ release. The vessels are not liable in the same manner at common law, as they are in a Court of Admiralty.

If the Court of Admiralty for this state cannot take cognizance of things which courts of common law may draw into their cognizance, it seems to have been nugatory in the Legislature to have given that Court any other jurisdiction than in cases of *prize;* for even in the case of wages, justly a favourite object of admiralty jurisdiction, mariners may sue for them at common law.

It appears to have been the intention of the Legislature, that justice should be done in the easiest and best manner, and that by the words "not cognizable at common law," should be understood, "not properly cognizable at common law."

The next *secondary* question is so connected with the definition of *a cause of prize*, and the treating of *that* subject introduces so many CONSIDERATIONS CONCERNING RELATIVE CIRCUMSTANCES IN THESE STATES, AND THE LAW OF NATIONS, and these again are SO COMBINED WITH ENQUIRIES AS TO THE JURISDICTION OF THIS COURT, that they cannot be conveniently, at least, not easily separated. We will at present therefore pass to the second *principal* question, reserving till that shall be discussed, what peculiarly relates to the question we now leave.

This state has all the powers of Independent Sovereignty by the Declaration of *Independence* on the 4th of *July*, 1776, except what were resigned by the subsequent *Confederation* dated the 9th of *July*, 1778, but not completed by final ratification until the *first* of *March*, 1781.

* Fictio, est in recerta, ejus quod est possibile, adversus veritatem, pro veritate a jure facta assumptio Doctor *Godolphin*'s view of Admiralty Jurisdiction, p. 84.

† *Zouch*, p. 131. *God.* p. 105. 3 *Blackstone*, 107.

‡ 3 *Lev.* 355.

1784. By the Confederation, *The United States* are vested, among other things, with the "sole and exclusive power of establishing rules for deciding in all cases what captures on land and water shall be legal, and in what manner prizes taken by land or naval forces in the service of *The United States* shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing Courts for the trial of piracies and felonies committed on the high seas, and establishing Courts for receiving and determining finally appeals in all cases of captures."

Such a Court was established by the style of "The Court of Appeals in cases of capture." Acts of Congress, *May* 24, 1780. By the commission, the Judges are "to hear, try and determine all appeals from the Courts of Admiralty in the states respectively, in cases of capture, which now are, or hereafter may be duly entered and made in any of the said states." Acts of Congress, *February* 2d, 1780.

It was resolved by Congress, *May* 24, 1780, "that all matters respecting appeals in cases of capture, now depending before Congress or the Commissioners of Appeals, consisting of members of Congress, be referred to the newly erected Court of Appeals to be there adjudged and determined according to law."

It is necessary to enquire, what is the reasonable and legal meaning of the *words of the Confederation*, and of Congress in their several acts relative to this subject, for that is the true meaning.

Thus we shall be led into a construction, by which the positive words may be properly and justly modified.

What are the foundations of such a construction here? *First*—The Council for the Respondent, are themselves compelled to quality the generality of the expression, "establishing Courts for receiving and determining finally appeals in all cases of captures," by adding, *as prize*. The addition is indispensably necessary; for without it, the words would comprehend every kind of taking, on land and water, in peace and war. Having been obliged to go so far, in qualifying the extent of the original expression, we are under the same necessity of explaining *the terms of qualification themselves;* and certainly we have the same right, founded on reason and law, to *explain* them, that we had to *introduce* them. In doing this we shall find, *Secondly*—That "captures, *as prize*, by citizens of *The United States*, may be carried into *foreign countries*, and be *legally* proceeded against in the Courts of Admiralty *there;* and therefore it is to be inferred that *the Confederation intended* only such captures," brought *infra præsidia* of *The United States*. That this was the intention thereof, further appears, as *Thirdly*—Congress, in the commission and resolution before mentioned, have shewn their sense of the words "cases of captures," by using them in reference to appeals "in cases of capture, which then were duly entered and depending," as well as to future cases; but none were "then entered and depending," except where the "captures" were brought *infra præsidia* of *The United States*. This sense of Congress, will

appear still more plain from their several following resolutions, prior to the Confederation; which were in force at the time of the capture made by Captain *Talbot*, and which were the ground-work of the *ninth* section of the Confederation. "*November* 25, 1775.—That it be recommended to the several Legislatures, as soon as possible to erect Courts of Justice, or give jurisdiction to the Courts now in being, to determine concerning captures to be made. If the capture be made on open sea, the prosecution shall be in the Court of such colony as the captor may find most convenient; provided, that nothing in this resolution, shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized, within any harbour of the same.—That in all cases an appeal shall be allowed to Congress, or persons appointed by them.—That when vessels are fitted out by private persons, the captures made, shall be to the use of the owners. *December* 5.—That in cases of re-captures, the re-captors shall retain for salvage, according to the time, &c. *March* 23, 1776.—That all vessels and goods belonging to inhabitants of *Great Britain*, taken on the high seas, by armed vessels of private persons, and commissioned, being libelled and prosecuted in any Court erected for trial of maritime affairs in any of the colonies, shall be deemed and adjudged to be lawful prize.—Vessels and goods taken near the shores of a colony, by the people, or a detachment of the army, shall be deemed lawful prize, and condemned in the Court of Admiralty of that colony.—Commissions to be obtained, and bonds to be given for observance of instructions from Congress. Instructions to the commanders of private vessels of war: You shall bring such vessels, &c. as you shall take, to some convenient port of the United Colonies, that proceedings may thereupon be had in due form, before the Courts which are or shall be there appointed to hear and determine causes civil and maritime.—You shall bring one or two of the principal persons of the vessel, as soon as may be, to the Judge of such Court to be examined, and deliver to the said Judge all papers, &c.—You shall keep and preserve every vessel, &c. by you taken, until they shall, by sentence of a Court properly authorized, be adjudged lawful prizes, not breaking bulk, nor suffering such a thing to be done." *Fourthly*—By the maritime law of nations, the *appropriation* of jurisdiction to *a particular* Court of Admiralty, depends upon the capture being *infra præsidia*, 3 *Blackstone*, 108. *that law* regarding proceedings *in rem*, the acquittal or condemnation of the ship or goods. Answer of the *British* Court, to the memorial delivered by order of the King of *Prussia*, *Exposition des motifs*. 11. 12 *Mod.* 143. It would be injurious to nations if it was otherwise; for it would cause competition of jurisdictions, and would occasion frauds. The usual method is simple and fair. *Fifthly*—The articles in the treaties of *The United States* with *France*, the *United Netherlands* and *Sweden*, with relation to prizes, refer to the cases of prizes *conducted into the ports* of the contract-

1784.

1784. ing powers, relying on cautions against malversations and contraventions to be given by commanders of private vessels of war, rules and regulations for deciding the legality of prizes, and trials in Courts of Admiralty generally. *Sixthly*—An authority to "establish rules for deciding in all cases, what captures on land or water shall be legal, and Courts for receiving and determining finally, appeals in all cases of captures," as prize, brought *infra præsidia* of *The United States*, together with the other powers vested in Congress, will sufficiently obviate the mischiefs apprehended from the irregularities of citizens of *Confederated America* upon the high seas.

Foreigners are protected by the Confederation, from the irregularities mentioned; for, Congress can, "exclusively, appoint Courts for the trial of piracies and felonies committed on the high seas," and can send out a naval force to cruise for and seize the offenders. If the Respondent was a *Frenchman*, and the decree goes against him, he could not justly complain; for he instituted his suit in an *American* Court. If the Appellants were *Frenchmen*, and the decree goes against them, they could not justly complain, for they took, without battle, by force and violence, from a friend and ally, that which in their sight, according to their own allegations and proofs, he had before fought for and captured, and afterwards voluntarily put themselves within the jurisdiction, precinct and power of an *American* Court. What are the sentiments of learned authors, treating of the law of nations, upon such an occasion? "Quæ ab hostibus capiuntur, *statim* capientium fiunt; which is to be understood, *when the battle is over*. *Voel*, and many writers he refers to, maintain with great strength, per solam *occupationem* dominium prædæ hostibus acquiri. One argument used to prove it, is, that *the instant* the captor has got *possession*, no friend, fellow-soldier, or ally, can take it from him, because it would be *a violation of his property*." Lord *Mansfield*, delivering the resolutions of the Court, in the case of *Goss and another* against *Withers*. In either case, and in the strongest light in which the affair can be viewed, it is no more than a matter to be treated of between their Sovereign and *The United States*. 2 *Shower*, 232. *Raym*. 473. If it be said that Congress should have a legal mode of making compensation, by rectifying improper decisions against foreigners, thereby to prevent disagreeable consequences, it is a doctrine that cannot be universally admitted, for reasons too plain to be insisted on. If it be confined to acts on the high seas, *provision has been made by the Confederation, in the cases where it was judged necessary*. What the rulers of nations desire and stipulate for in treaties, as to transactions on the high seas, is to secure their people from being plundered by the citizens or subjects of those with whom they treat. That great point being guarded, and it is guarded here, the danger of consequences from cases that rarely occur, complicated with a variety of circumstances, and decided upon in open Courts, are not to be apprehended. When sovereigns are determined to quarrel, they will never want pretences; but while they revere the

sacred obligations of justice and humanity, or the precious sentiments of the good and wise in their own and succeeding ages, they will not disturb the repose of the world, by violating the law of nations, upon slight claims of their subjects, or "*in re minime dubia.*" Answer of the *British* Court, 23 *Vattel.* Bo. 11, ch. 4, 5, 7. Neither can *one of these states* prey upon another, without violating the Confederation, for by that, "No vessel of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by *The United States* in Congress assembled, for the defence of such state, or its trade; nor shall any state engage in any war without their consent, unless invaded by enemies, or certainly advised of an intended invasion by *Indians:* Nor grant commissions to any ships or vessels of war, nor letters of marque, or reprisal, except it be after a declaration of war by *The United States* in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, unless infested by pirates, and then only until *The United States* in Congress assembled, shall determine otherwise." Besides, "All disputes and differences concerning *any cause whatever*, are determinable by Courts to be established under the authority of Congress." 1784.

Let us now enquire whether the present case is *such a cause of prize* as is mentioned in the many cases quoted by the Council for the Respondent.

In what circumstances is any of those cases like this? Does it appear from any of them, that the *Prize Court* in *England* would decide *such a case as this is?* Does it appear that the Courts of *Westminster Hall*, in any action for *such a trespass as this*, would refuse to take cognizance, because the original taking was a capture *as prize?* Does it appear that they would refuse to take cognizance, under colour that the second taking was a capture *as prize?* If they should, ought any such decision to have weight with us in this case? What are the cases quoted? A justification by persons of ORIGINAL *captures made by themselves*, because made *as prize.* What is this case? A justification by persons of *their conduct, after a capture made in battle, by others in their sight*, under pretension of right, founded on *that circumstance.* If they say, the second taking was an original capture *as prize*, their assertion is *falsified* by *their own proofs*, that *they saw the capture made by others*, the day before. If they say, their proceedings were *united* with the original capture *as prize*, by being *in sight* at the time, let them take care that their *pretension* of right is well founded. *Comb.* 367. If it is not, their proceedings are *distinct* from the original capture, and they are plainly trespassers, and must abide by the consequences. We are clearly of opinion, that their *pretension* of right is utterly unfounded, and that the whole conduct of the commanders and crews of the brigs, was cruel, unprovoked, wanton, and *mala fide.* In this very singular and extraordinary case, they have exerted themselves to disable the Respondent from proving the capture to be prize; and is the

1784. sole question afterwards, to be, *prize or not?* What necessity is there for determining whether the *Betsey* was prize or not? Is it not evident from the case of *Combs* against *the Hundred of Bradley*, in *Salkeld*'s Reports, and of *Goss and another* against *Withers*, in *Burrow*, and many other cases, that an action will lye on *possession* by the Plaintiff? and with what peculiar force does the reason apply in this case, for the action being maintained merely on the possession? This Court, and the Court of Admiralty are competent, not only to direct proceedings, but to ascertain facts, judge of them, and the law upon them, and assess damages, as justice may require. As to the notion of *mistake* excusing, it is a *petitio principii*. The *mistake* does not appear—the *crime* does. So far from *behaving as partners* in the capture, *with the Argo*, the commanders of the three brigs, who saw the surrender to her, chase her off; send the *Betsey as prize to themselves only*, for a port *distant from the home of the captors, and in the eye of the wind*, though in a part of the sea where she was *particularly exposed* to dangers from the enemy, with orders to avoid certain ports, *for fear of the Argo*'s *falling in with her*. In fact, it was not a *real* but a *pretended* capture, *as prize*, by them. Are we then bound, *in such a case*, to call it *a cause of prize* because the original taking *was* a capture, as prize? Or are we to refuse to call it *a trespass* though the second taking *was not* a capture, as prize?

How far soever the learned Judges in *England* have carried the justification of captures, from the circumstance of their being made as prize, yet they never have carried it as far as this case extends. That they have gone a great way is evident. In the cited case of *Vanderwoodst and others* against *Thompson*, the Defendant, in an action of trespass, having a letter of *marque*, took a vessel that made some resistance, and carried her to *Newcastle*, where she was seized by the Custom-house officers, *for having smuggled goods on board;* and she was afterwards condemned in the *Exchequer*. It was contended for the Plaintiff, that the capture was *unlawful*, because the Defendant *did not belong to the Custom-house*, and he could not justify the seizure under the *hovering* act of 6 *Geo. I. ch.* 11. as *Kings' ships only* can seize *under such circumstances*. It was held, "As there was reason to *suppose* that the ship was a pirate, though *the Jury should be satisfied she was not really so*, yet the action would not lye." Afterwards, "there was a motion for a new trial, which, upon consideration, was denied by the Court."

If that cause *was* cognizable in the *Prize Court*, and if that Court determines solely by the law of nations and treaties, as is laid down by the Judges, how were other nations interested in the principle of such a decision? If it *was not* cognizable in the *Prize Court*, how can it be applied to the present case, in favour of the Respondent?

To proceed—If the Courts of *Westminster Hall*, in an action for such a trespass as this, *should* refuse to take cognizance because the original taking was a capture *as prize*, or under colour that the

second taking was a capture *as prize*, ought any such decision to have weight *with us in this case?*—It ought not. 1784.

Such a decision must turn entirely upon the municipal law of *England*. It must be founded upon this principle governing in the cases cited by the Council for the Respondent; "that, of a seizure *as prize*, the *Common Law* does not take notice as a trespass." *Le Caux* and *Eden*. Admit the principle. It applies not. *This* is not a *Common Law* Court. The act of Assembly establishing this Court, makes it "a Court of Appeals from definitive sentences or decrees of the Admiralty." We are *therefore* a Court of Admiralty. "If the sentence of the Court of Admiralty is thought to be erroneous, there is, in every maritime country, a Superior Court of *Review*, &c. to which the parties who think themselves aggrieved, may appeal; and this Superior Court judges by the same rule which governs the Court of Admiralty, viz. the law of nations and treaties. This manner of trial and adjudication is supported, alluded to, and enforced by many treaties." Answer of the *British* Court, &c. We are a Court of Admiralty, competent to judge by *that rule*. The act of Assembly establishing Admiralty Jurisdiction in this state, declares, that the Court shall be governed by "the law of nations." Whatever in the law of nations relates to a Court of Admiralty, relates to this Court, *because no treaty has diverted the application*. Answer of the *British* Court, &c. *Vattel*, b. 2, ch. 7. 3 *Blackst.* 69.

Much has been said of a distinction in *England*, between the *Instance Court* and the *Prize Court*, though the powers of both are exercised by the same person; and it is urged that *only the latter* judges by the law of nations and treaties. We are told, "it is no more like *a Court of Admiralty*, than it is to any Court of *Westminster-Hall;* that the manner of proceeding is totally different; that the appeal is different—to Delegates from the Admiralty—to Commissioners consisting of Privy Counsellors, from the Court of Prize.—That to constitute the authority of the Prize Court, or to call it forth in every war, a commission under the Great Seal issues, &c."* Such a distinction may prevail in *England*, but is it known or regarded in other nations? The words "*to call it forth*," are material. It seems only a solemn, official, notification to the Admiralty, that there is a war, and that it may proceed accordingly, as a declaration of war is a notification to the people in general. But this declaration does not make the war in the one case; nor, perhaps, does the commission constitute the authority in the other. It is confessed, "that *the most ancient instrument* shews *a Prize Jurisdiction* either *inherent* or by commission *in the Admiral*. It is a letter from *Edward* the *third* to the King of *Portugal*." And, "that since the reign of Queen *Elizabeth*, the *Judge of the Admiralty*, either by virtue of an *inherent* power, or the King's commission, or both, has

* Lord *Mansfield* delivering the resolution of the Court, in the case of *Lindo* against *Rodney and another*.

1784. *solely* exercised *the jurisdiction of Prize*—and that as far back as particular cases can be traced, which is for a century, the *Admiralty* has judged of and condemned goods taken on land, *as prize*, as well as goods taken on sea." Lord *Mansfield*, delivering the resolution of the Court, in the case of *Lindo* against *Rodney and another*.*

What do treaties, ancient and modern, stipulate for, in order to guard against violences on the seas? A trial in *the Court of Admiralty*, as soon as possible, before the effects taken are in any manner to be disposed of. Why? because, by the maritime law of nations, that Court judges by the law of nations and treaties. Sir *George Lee*, Doctor *Paul*, Sir *Dudley Ryder*, and Mr. *Murray*, now Lord *Mansfield*, in their report, which forms the principal part of the answer of the *British* Court, and is so celebrated by Messrs. *Montesquieu* and *Vattel*, † say, "By the maritime law of nations, universally and immemorially received, there is *an established method of determination*, whether the capture BE, OR BE NOT, LAWFUL PRIZE. Before the ship or goods can be DISPOSED OF by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon, as prize, in *a Court of Admiralty*, judging by the law of nations and treaties. The proper and regular Court for these condemnations, is the Court of that state to whom the captor belongs."

Are we then, because in *England* they call the Admiralty Court a Prize Court when it acts in a cause of prize, and it then proceeds in a different manner, with an appeal to commissioners of the Privy Council, to reject the "universal and immemorial" compact of mankind? There was a time—when we listened to the language of her Senates and her Courts, with a partiality of veneration, as to oracles. It is past—we have assumed our station among the powers of the earth, and must attend to the voice of nations—the sentiments of the society into which we have entered.

Lord *Mansfield*, in the cause of *Lindo* against *Rodney and another*, said, "The end of a Prize Court is to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis*, if upon the most summary examination, there does not appear a sufficient ground; to condemn finally (if the goods really are prize) against every body, giving every body a fair opportunity of being heard:—A captor may, and must force every person interested, to defend; and every person interested, may force him to proceed to condemn without delay. *These views* cannot be answered in any Court of

* The very great antiquity of the Court of Admiralty in *England*, and the extent of its jurisdiction, may be known from the learned *Selden*'s notes on *Fortescue* de Laudibus, p. 67. *Zouch* 44, &c. *Godolph* p. 22, &c. Tho' the authority of this Court, with respect to matters in which *foreign nations* may be concerned, and particularly to captures *jure belli*, is treated of, yet no distinction is made by these authors, as to the *Court of Admiralty* and the *Court of Prize*

† *Montesquieu*'s Letters, 5 *March*, 1753. *Vattel*, bo. 2, ch. 7. § 84. 3 *Blackst.* 70.

Westminster-Hall, and *therefore* the Courts of *Westminster-Hall* never have attempted to take cognizance of the question—prize or no prize; not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject." 1784.

"*These views* are answered" here in the Court of Admiralty, and with as good cautions as in *England;* and as far as a Court of Appeals is concerned, they can be answered in this Court as fully as in a Court of Appeals to Commissioners there.

It seems proper here, to take notice of the objection against the authority of this Court, founded on the words of the law by which it was established, prior to the completion and final ratification of the Confederation. It is constituted "a Court of Appeals for reviewing, re-considering, and correcting, the definitive sentences and decrees of the Court of Admiralty, *other than in cases of capture upon the water in time of war, from the enemies of the United States*, &c."

The construction of these words depends upon the resolutions of Congress, the Confederation, and the law by which the Admiralty Jurisdiction is established, taken together. If the principles of our preceding construction are right, they apply as aptly here, and the appeal is regular. If it is not, there will be a defect of justice The Legislature intended to give this Court an authority to receive all appeals from the Judge of Admiralty, where they were not resigned to a Continental Court of Appeals. This was not resigned. It therefore belongs to this Court. We will endeavour to promote justice, according to the intentions of the Commonwealth, conveyed in the laws; and not demit any part of her sovereignty, unless we are convinced beyond a doubt, that it is our duty to do so.

We now return to *the last* of the *secondary* questions. Did the Court of Admiralty take cognizance *as a Prize Court?* In considering this question, a very strict attention must be had to *the proceedings* of the Court of Admiralty in this case.—That Court was also erected by an act of Assembly, prior to the completion and final ratification of the confederation. It is, to be sure, a Court of Prize, and an Instance Court, if that mode of expression be preferred; or in other words, the Judge who has but one commission, may try causes of Prize, and other matters of Admiralty Jurisdiction. There is a difference in his proceedings for condemnation in causes of prize, and those in other cases. His style by law is, "Judge of the Admiralty." The reasonable and legal meaning of the 3d, 4th and 6th sections of the law under which he acts, is, that in trying a cause of prize, the vessel or goods taken, must be within his jurisdiction, precinct and power. They are these,—"That in cases of prize, capture or re-capture upon the water, from enemies, or by way of reprisal, or from pirates, the same shall be tried, adjudged, and determined, *as well as* to the question whether *prize or not*, as to *the claims of the parties interested or pretending to be interested in the same*, by the law of nations and the acts and ordinances of Congress, be-

1784. fore the said Judge, by witnesses, according to the course of the civil law;" and—"That the captain or commander of any ship or vessel of war, or prize-master, or other person, *having charge* of any capture or re-capture, or other property seized upon the water as aforesaid, who shall *conduct or bring the same into port*, shall immediately deliver the same, without diminution, to the Marshal of the said Court of Admiralty."

The law then goes on to direct the mode of proceeding to the condemnation, ordering, "That the Judge shall cause notice to be published immediately in some news-paper of the day appointed for the trial of *such prize*, inserting therein the name, size or burthen, and other description of the said vessel, *so taken and brought into port*, the name and surname of the master, the place she last sailed from, the port for which destined, and in case of a recapture, by what ship or vessel taken, to the end that all persons concerned may appear and shew cause, if any there be, wherefore *such capture*, or *re-capture*, goods, merchandise, or other property, should not be condemned and adjudged to the Libellants."

Does the present case in any manner resemble the "*cases of prize*" *described in this law?* Where are "*Claimants interested or pretending to be interested?*" Claimants are *voluntary* applicants for justice. Shall trespassers, *compelled* to answer for their wrong, cover themselves with that character? Can there be "*Claimants*," but in a proceeding *in rem?* How would the publication before mentioned suit *such Claimants* as the appellants? Were the proceedings of the Judge in this case, *such as he constantly has observed* in cases of prize? They were not. Application was made to him for *damages*. He proceeded in that line. Here is neither libel nor process against the capture,—no monition,—"no notice" under the act of Assembly.

What could give the Judge of the Admiralty for *this state*, jurisdiction to proceed as a Court of Prize upon a capture contested *between citizens of different states*, which is the case here, rather than any Court of Admiralty in any other state, when the property captured was not within the power of his jurisdiction? Because, it is said, some of the offending captains and their vessels came into this port. Does the jurisdiction of a Court of Prize depend on certain offenders, with respect to the capture coming into a port? Where are the authorities of law to shew that *this circumstance* can give such jurisdiction, or, that there can be an institution of *a cause of prize, according to the maritime law of nations, for damages only?* The authorities cited, that were thought most apposite, and were most relied on by the Council for the Respondent, were those of *Brown* and *Burton* against *Franklin*, the King's Proctor; and of the *King* against *Broom*. But they are not in any manner applicable. In the first, the Plaintiffs, masters of two vessels, but having no regular letters of *marque*, took a *French* ship, cargo and money, upon land, in the *East Indies*—they being *English* subjects, it was held, that they acquired no right by

this capture, but that it was *a perquisite of the Admiralty*. The King's Proctor, upon the usual monition, got a sentence of condemnation for the whole, in order to make them account. In brief, *they had effects in their hands*, which by the maritime law of *England*, belonged to the King or his Admiralty, and they were obliged to account for them *according to that law*. 12 *Mod.* 135. Lord *Mansfield* calls it a proceeding *in rem*. *Le Caux* and *Eden*, in the notes. The second case was of the same kind, and was decided on the same principles. It was further said by the Council for the Respondent, that the Court of Admiralty that *first* proceeds in such a case as the present, acquires an exclusive right of deciding upon it, in the same manner as the nation that first commences a judicial process against pirates, may pronounce sentence against them. To say no more on this comparison, it is sufficient to observe, that such a right may be attributed to the atrocity of the guilt, as the offenders are *hostes humani generis*. 1784.

If the coming of trespassers, or of the vessels in which they trespassed upon the high seas, within the power of a Judge's jurisdiction, authorizes him to proceed against them, to what confusion may it lead? A capture is made from an enemy; afterwards friends trespass against the prize, and arrive in different ports, the fate of the prize being unknown. They are prosecuted in one or more Courts of Admiralty. The prize at length arrives in a different port, and is libelled in a different Court of Admiralty, for condemnation in the usual manner. What contests for jurisdiction must ensue? "*Quod inconveniens est non licitum est.*"

We are unanimously of opinion, that the Judge of the Admiralty for this state, had jurisdiction in this cause, and that the appeal to us is regular. We decree, that the Respondent recover and have of the Appellants, 1,141*l.* 5*s.* 4*d.* with costs, except those in this Court, of which each party is to pay a moiety.*

* See *post Purviance* v. *Agnus*. *Doane's* adm'tor v. *Penhallow*. 2 *Dall. Rep.* 160. 174. 3 *Dall. Rep.* 54.

Oyer and Terminer, &c.

AT PHILADELPHIA:

October Sessions, 1784.

RESPUBLICA *v.* KEATING.

LUKE KEATING was indicted for forging a promissory note payable to *John Meng*, with a forged indorsement of *John Meng & Co.*—*Lewis*, for the Defendant, objected to the admission of *Meng*'s testimony; contending, that if *Meng* could prove that the note was false, it would discharge him from the payment; and if he proved it to be a genuine note, his evidence might be given against him in a civil action founded upon the note; in either event he was an interested witness, and, consequently, an incompetent one. *Salk.* 283. *Hardr.* 331. 2 *Hawk.* 433. *Stra.* 728. 1043. 1104.

Ingersol (who prosecuted on this occasion for the *Attorney General* argued, that, to prevent an interruption and failure of justice, and the escape of offenders, the injured person was in all cases of indictment a competent witness. *Vent.* 49. 78. *Vin. tit. Evid. pl.* 26. 2 *Stra.* 1229. and *Abrams* v. *Bunn* establish this doctrine. 4 *Burr.* 2252. He insisted that the evidence given by *Meng* on the present trial could not affect him in a civil action; and observed, that if any thing relative to the civil action should decide the case before the Court, the probability was, that *Meng*'s testimony would be favourable to the prisoner; for if *Meng* swears the note to be false, he can gain nothing; but if he proves it to be true, he testifies against his own interest.

Lewis in reply, acknowledged that the evidence given on this trial, could not be offered in favour of *Meng* on another; but he urged, that if the note itself were proved to be forged, it might be detained by the Court and not suffered afterwards to be sued; on

the same principle that it is said in 6 *Co.* 45. "the Court will damn a bond, on which the obligee has recovered." 1784.

M'KEAN, *Chief Justice.* The Court will not detain a note or bond in the circumstances mentioned. With respect to the competency of the witness, I remember a case before CHEW, *Chief Justice*, where one *Chapman* was indicted for playing with false dice, and the person cheated was admitted to be a witness. On the authority of that decision, in a recent trial at *Lancaster*, the injured party was allowed to give evidence, after a full argument upon the present objection. We have, therefore, no doubt that *Meng* is a competent witness.*

RESPUBLICA *v.* DE LONGCHAMPS.

CHARLES JULIAN DE LONGCHAMPS, commonly called the *Chevalier De Longchamps*, was indicted, that "he "on the 17th of *May*, 1784, in the dwelling-house of his Excel- "lency the French Minister Plenipotentiary, in the presence of "*Francis Barbe Marbois*, unlawfully and insolently did threaten "and menace bodily harm and violence to the person of the said "*Francis Barbe Marbois*, he being Consul General of *France* to "the *United States*, Consul for the state of *Pennsylvania*, Secretary "of the French Legation, &c. resident in the house aforesaid, and "under the protection of the law of nations and this Common- "wealth." And that "afterwards, to wit on the 19th of *May* in "the public street, &c. he the said *Charles Julian de Longchamps* "unlawfully, premeditatedly and violently, in and upon the person "of the said *Francis Barbe Marbois* under the protection of the "laws of nations, and in the peace of this Commonwealth, then "and there being, an assault did make, and him the said *Francis* "*Barbe Marbois* unlawfully and violently did strike and otherwise, "&c. in violation of the laws of nations, against the peace and "dignity of the *United States* and of the Commonwealth of *Penn-* "*sylvania*."—To these charges the Defendant pleaded *not guilty.*

The evidence, in support of the first count, was, that on the 17th of *May*, *De Longchamps* went to the house of the Minister of *France*, and after some conversation with *Monsieur Marbois*, was heard to exclaim in a loud and menacing tone, "*Je vous des-honnerera*, *Poliçon*, *Coquin*," addressing himself to that gentleman. That the noise being heard by the Minister, he repaired to the room from which it issued, and that in his presence the Defendant repeated the insult offered to *Monsieur Marbois* in nearly the same terms.

In support of the second count, it appeared, that *De Long-champs* and *Monsieur Marbois*, having met in *Market-street*, near the coffee-house, entered into a long conversation, in the course of which, the latter said that he would complain to the civil authority, and the former replied, "you are a Blackguard." The witnesses generally deposed that *De Longchamps* struck the cane

* See 2 *Dall. Rep.* 239. *Respublica* v. *Rose.*

1784. of *Monsieur Marbois*, before that gentleman used any violent gestures, or even appeared incensed; but that as soon as the stroke was given, *Monsieur Marbois* employed his stick with great severity, till the spectators interfered and separated the parties. One of the witnesses, indeed, said, that previously to engaging with their canes, he observed the two gentlemen, at the same instant, lay their hands on each others shoulders, in a manner so gentle, that he, who had heard it was customary among the *French* to part with mutual salutations, imagined a ceremony of that kind was about to take place, and was surprised to see *De Longchamps* step back, and strike the cane of *Monsieur Marbois*.

On the part of the Defendant, evidence was produced of his having served with honour in the *French* armies, and his commission of Sub-Brigadier in the dragoons of *Noailles*, was read. It appeared that the occasion of his calling on *Monsieur Marbois*, was to obtain authentications of these, and some other papers relative to his family, his rank in *France*, and his military promotions, in order to refute several publications, which had been made in the news-papers, injurious to his character and pretensions. The refusal of *Monsieur Marbois* to grant the authentications required, was the grounds of *De Longchamps'* resentment, and the immediate cause of his menaces at the minister's house.

With respect to the assault, one witness (a Frenchman) swore that he saw *Monsieur Marbois* give the first blow, and his Excellency the President of the state, testified, that *Monsieur Marbois*, having complained to him of the insult received in the minister's house, he sent a message to *De Longchamps*, requesting to see him; that the Defendant readily attended, when his Excellency explained his reasons for apprehending that he meditated some personal violence upon *Monsieur Marbois*, and requested him to pledge his parol of honour, that he would prosecute the matter no farther. This he declined in polite, but positive terms; when his Excellency proposed to *Monsieur Marbois* that the Chevalier should be bound over for his good behaviour; but that gentleman would not accede to the proposal.

Sergeant and *Vannost*, for the Defendant, contended, that the expressions laid in the first part of the indictment, were too equivocal to be construed into menaces of corporal harm. "I will dishonour you," is a sentence that conveys more than one signification; and the threat would have been fully accomplished, had the Chevalier descended to any of those very libellous publications, with which his own character had been aspersed. The established maxim, that words ought to be taken in their mildest sense, operates, therefore, in favour of the Defendant; and, at all events, that they do not amount to an assault, and are not the subject of an indictment, are principles incontrovertibly established. 3 *Bl. Com.* 20. *Finch L.* 202. 4 *Inst.* 108. They insisted, that the President offered *Monsieur Marbois* the only security which the law will allow on such occasions, and which would effectually have restrained any future violence intended to be

committed upon his person. That therefore his having suffered a second insult, must be imputed to his refusal to accept that security. 1784.

It is pretended, that by the menaces at the house of the minister, the law of nations was violated; yet, it must be remembered, that the reparation sought, and the remedy offered, are confined to the municipal law of *Pennsylvania*, where the offence was committed; and, in all cases of menaces, the law of *Pennsylvania* yields no further relief, than the imposition of a legal restraint on the execution of those menaces. The degree of outrage is, likewise, to be computed by the quality of the person offended; and as the application of the Defendant was to procure a certificate from the *Consul of France*, if *Monsieur Marbois* has been at all insulted, it is only in that character, which is not protected by the law of nations. *Vatt. lib.* 4. § 75. and consequently there is no redress, but what the law of the State provides.

On the second count of the indictment, they argued, that it was not sufficiently proved, that *Delongchamps* was the aggressor. One witness has sworn positively, that the first blow was given by *Monsieur Marbois*, and another describes the parties to have laid their hands on each other, at the same instant. Though other witnesses did not see these circumstances, yet they are grounded upon affirmative testimony, which cannot be destroyed by that which is merely negative. *Gilb. L. E.* 157. If, therefore, the evidence for the Defendant was entitled to credit, it appeared, that *Monsieur Marbois* was the author of the outrage; and, it is so well established that no elevation, rank, or immunity of character, can abrogate the right of self defence, that if a Sovereign Minister offend a citizen, the latter may oppose him, without departing from the respect due to his station, and give him a lesson that shall both efface the stain and expose the author of the outrage. *Vatt. lib.* 4. § 80.

The *Attorney General*, assisted by *Wilson*, supported the prosecution. The necessity of sustaining the law of nations, of protecting and securing the persons and privileges of ambassadors; the connection between the law of nations and the municipal law, and the effect which the decision of this case must have upon the honour of *Pennsylvania*, and the safety of her citizens abroad, were stated at length from 3 *Burr.* 1480. 1 *Bl. Com.* 253. 4 *Bl. Com.* 70. *Vatt. pref.* 6. *page* 203. *Vatt. lib.* 1. § 6. *lib.* 4. § 84. § 80. *Ayliff*'s *Pandect. lib.* 2. 132.

On the first part of the indictment, they observed, that the meaning of the menace used in the Minister's house, was to be sought for in the opinion of the *French* nation. With them, the phrase extended farther than colloquial dishonour (*that Monsieur Marbois* had already suffered) it implied personal violence. This was the idea, likewise, of his Excellency the President of the State, and the event confirms it beyond a doubt. If, therefore, the menace had been attended with its natural effect, impressing *Monsieur Marbois* with an apprehension for his own safety, the

1784. Consul General of *France*, and the Secretary of the *French* Legation to the *United States*, must have been prevented from paying a proper attention to his appointments, which is certainly a violation of the law of nations. *Vatt. lib.* 2. § 218. Upon the same principle that the infringement of a statute is an indictable offence, though the mode of punishment is not pointed out in the act itself, an offence against the laws of nations, while they compose a part of the law of the land, must necessarily be indictable.

With respect to the assault, they contended, that the weight of the testimony proved *De Longchamps* to be the aggressor; and the respective characters of the parties tend to confirm it: *Monsieur Marbois* preserved during the whole transaction, his constitutional temperament—cool, deliberate, and self possessed; while *De Longchamps*, naturally captious and impetuous, became incensed at the imaginary injuries he had received, and, by his own declarations, was determined to be revenged.

The CHIEF JUSTICE, after minutely recapitulating the evidence, and applying it to the charges in the indictment, expressed the following sentiments.

M'KEAN, *Chief Justice.* This is a case of the first impression in the *United States.* It must be determined on the principles of the laws of nations, which form a part of the municipal law of *Pennsylvania;* and, if the offences charged in the indictment have been committed, there can be no doubt, that those laws have been violated. The words used in the Minister's house, (which is to be considered as a *Foreign Domicil*, where the Minister resides in full representation of his sovereign, and where the laws of the State do not extend) may be compared to the same words applied to the Judges, in a Court of Justice, where they sit in representation of the majesty of the people of *Pennsylvania.* In that case, the offender would be immediately committed to jail, without the preliminary process of an indictment by a Grand Jury; and, in the case before us, if the offender is convicted, he may certainly be punished by fine and imprisonment.

In actions of slander, words were formerly construed in the mildest sense they would admit; but reason has superseded such forced interpretations, and words are now to be taken according to their ordinary import and meaning. Those expressed by the Defendant, are evidently of a tendency so opprobrious and violent, that they cannot fail to aggravate the outrage which has been committed.

As to the assault, this is, perhaps, one of that kind, in which the insult is more to be considered, than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen too often induce duelling, and terminate in murder. As, therefore, any thing attached to the person, partakes of its inviolability; *De Longchamps'* striking *Monsieur Marbois'* cane, is a sufficient justification of that gentleman's subsequent conduct.

BRYAN, *Justice.* The distinction between a Consul and a Member of the Legation, is not warranted in this case; for, *Monnsieur Marbois* never ceased to be the latter. As Secretary to the Legation, his authority descends from a high source, his commission being made out in the same form as the Minister's, and signed in the same manner by the King his master. 1784.

The Jury, at first, found the Defendant guilty of the Assault *only;* but, the Court desiring them to re-consider the matter, they returned with a verdict against him on both counts.

The sentence of the Court was suspended, in consequence of a case stated by his Excellency the President, and the Honourable Supreme Executive Council, for the opinion of the Judges. It was argued in open Court, on the 10th and 12th of *July*, by five Council, two for the affirmative, and three for the negative; and on the 7th of October, the prisoner being brought before the Court, the CHIEF JUSTICE stated the case, repeated the answers of the Judges, and, finally, pronounced the judgment of the Court, in the following manner.

M'KEAN, *Chief Justice.—Charles-Julian De Longchamps:*—You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the honourable *Francis-Barbe De Marbois*, Secretary to the Legation from *France*, and Consul General of *France* to the *United States* of *America*, in the mansion-house of the Minister Plenipotentiary of *France;* and for an Assault and Battery committed upon the said Secretary and Consul, in a public street in the city of Philadelphia. To this indictment you have pleaded, that you were not guilty, and for trial put yourself upon the country;—an unbiassed Jury, upon a fair trial, and clear evidence, have found you guilty.

These offences having been thus legally ascertained and fixed upon you, his Excellency the President, and the Honourable the Supreme Executive Council, attentive to the honour and interest of the State, were pleased to inform the Judges of this Court, as they had frequently done before, that the Minister of *France* had earnestly repeated a demand, that you, having appeared in his house in the uniform of a French regiment, and having called yourself an officer in the troops of his Majesty, should be delivered up to him for these outrages, as a *Frenchman* to be sent to *France;* and wished us in this stage of your prosecution, to take into mature consideration, and in the most solemn manner to determine:—

1st. Whether you could be legally delivered up *by Council*, according to the claim made by the late Minister of *France?*

2dly. If you could not be thus legally delivered up, whether your offences in violation of the law of nations, being now ascertained and verified according to the laws of this Commonwealth, you ought not to be imprisoned, until his most Christan Majesty shall declare, that the reparation is satisfactory?

And 3dly. If you can be thus imprisoned, whether any legal act can be done by Council, for causing you to be so imprisoned?

1784. To these questions we have given the following answers in writing:—

" In compliance with the request of his Excellency the Presi-
" dent, and the Honourable the Supreme Executive Council, we
" postponed passing sentence upon *Charles-Julian De Longchamps*,
" until we had maturely considered the three questions above pro-
" posed for our determination. On the 10th and 12th days of July
" the several questions were argued before the Court by five Coun-
" cil, two on the affirmative and three on the negative side. We
" have kept the matter under advisement until this day, and now
" deliver our opinion thereupon.

1. " And as to the first question, we answer, That it is our
" opinion, that, in *this case*, *Charles-Julian De Longchamps* cannot
" be legally delivered up by *Council*, according to the claim made
" by the Minister of *France*. Though, we think, cases may oc-
" cur, where *Council* could, *pro bono publico*, and to prevent atro-
" cious offenders evading punishment, deliver them up to the jus-
" tice of the country to which they belong, or where the offen-
" ces were committed.

2. " Punishments must be inflicted in the same county where
" the criminals were tried and convicted, unless the record of
" the attainder be removed into the Supreme Court, which may
" award execution in the county where it sits: they must be such
" as the laws *expressly* prescribe; or where no stated or fixed
" judgment is directed, according to the *legal discretion* of the
" Court; but judgments must be *certain and definite* in all respects.
" Therefore, we conclude, that the Defendant cannot be impri-
" soned, until his most Christian Majesty shall declare, that the
" reparation is satisfactory.

3. " The answer to the last question is rendered unnecessary
" by the above answer to the second question."

The foregoing answers having been given, it only remains for the Court to pronounce sentence upon you. This sentence must be governed by a due consideration of the enormity and danger-ous tendency of the offences you have committed, of the wilful-ness, deliberation, and malice, wherewith they were done, of the quality and degree of the offended and offender, the provo-cation given, and all other circumstances which may any way ag-gravate or extenuate the guilt.

The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this State, and is to be collected from the *practice* of different nations, and the *authority* of *writers*.

The *person* of a public minister is sacred and inviolable. Who-ever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world.

All the reasons, which establish the independency and inviolability of the *person* of a Minister, apply likewise to secure the immunities of his *house:* It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade it's freedom is a crime against the State and all other nations. 1784.

The *Comites* of a Minister, or those of his *train*, partake also of his inviolability. The independency of a Minister extends to all his household; *these* are so connected with him, that they enjoy his privileges and follow his fate. The *Secretary* to the Embassy has his commission from the Sovereign himself; he is the most distinguished character in the suit of a public Minister, and is in some instances considered as a kind of public Minister himself. Is it not then an extraordinary insult to use threats of bodily harm to his person in the domicil of the Minister Plenipotentiary? If this is tolerated, his freedom of conduct is taken away, the business of his Sovereign cannot be transacted, and his dignity and grandeur will be tarnished.

You then have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of this law (gentlemen of amiable characters, and highly esteemed by the government of this State) in a most wanton and unprovoked manner: And it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honour of the State, and maintain peace with our great and good ally, and the whole world.

A wrong opinion has been entertained concerning the conduct of *Lord Chief Justice Holt* and the Court of King's-Bench in *England*, in the noted case of the Russian Ambassador. They detained the offenders, after conviction, in prison, from term to term, until the Czar *Peter* was satisfied, without ever proceeding to *judgment;* and from this it has been inferred, that the Court doubted, whether they could inflict *any punishment* for an infraction of the law of nations. But this was not the reason. The Court never doubted, that the law of nations formed a part of the law of *England*, and that a violation of this general law could be punished by them; but no punishment less than *death* would have been thought by the Czar an *adequate* reparation for the arrest of his Ambassador: *This* punishment they could not inflict, and *such* a sentence as they could have given, *He* might have thought a fresh insult. Another expedient was therefore fallen upon. However the princes of the world, at this day, are more enlightened, and do not require impracticable nor unreasonable reparations for injuries of this kind.

The second offence charged in the indictment, namely the Assault and Battery, needs no observations.

Upon the whole THE COURT, after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:—

1784. That you pay a fine of one hundred French Crowns to the Commonwealth; that you be imprisoned until the 4th day of *July* 1786, which will make a little more than two years imprisonment in the whole; that you then give good security to keep the peace, and be of good behaviour to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of *Pennsylvania*, for the space of seven years, by entering into a recognizance, yourself in a thousand pounds, and two securities in five hundred pounds each: that you pay the costs of this prosecution, and remain committed until this sentence be complied with.

Common Pleas,

PHILADELPHIA COUNTY.

December Term, 1784.

YOUNG *v.* REUBEN.

UNDER a rule of this Court, Referrees reported, "that the sum of £.75. *was due the 3d of March last*, with interest on the same". The time mentioned was several months before the meeting of the Referrees; and, on motion, THE COURT set aside the report for the uncertainty; as there might have been a sum due on the *3d of March*, and nothing due at the time of making the report.

GERARD *v.* BASSE *et al.*

THE Defendants declining in their circumstances, and being much pressed by their creditors, *Basse* fled, and *Soyer* was imprisoned at the suit of the Plaintiff. During his confinement, he executed a bond and warrant to confess judgment to which there was *one* seal, and the signature was in this form, "*John Abraham Soyer* for *Basse & Soyer*."

And now a motion was made to set aside the judgment, at the instance of the creditors in general, in order that an equal distribution might be made of the effects under a domestic attachment, which had issued against *Basse* and *Soyer*.

Sergeant and *Moylan*, in support of the motion, argued, that the bond was a payment of the debt in the eye of the law; and

1784. that although *Basse* was liable to *Soyer*'s action for a contributon; yet not having signed the warrant, he was not subject to the execution of *Gerard*, the Plaintiff. 2 *Black. Com.* 295. 3 *Bac. Abr.* 590. 2 *Bac. Abr.* 227. 358. 2 *Vern.* 293. 2 *Ch. Cases*, 228. They said, that the execution of deeds was not to be regulated by, nor does the effect of them depend upon, a particular custom of merchants; but they are derived from a superior source, to wit, the law of the land; and they insisted that *Basse* not having joined in the warrant, the judgment, being joint, must fall to the ground. 2 *Black. Rep.* 294. *Shep.* 69.

Ingersol, in support of the judgment:—It is regularly true, that, according to 3 *Bac. Abr.* 611. one merchant may bind his partner, by accepting a bill drawn on both. If, then, in substance, the act of one obliges the other, what difference arises from the circumstance of the delivery not being formally executed? That question was agitated in the case of *M'Kim* v. *M'Farlan:* there *Levinz* indorsed a note of *M'Farlan*'s to *M'Kim*; but being indebted to *M'Farlan*, he thought it proper to give him previous notice of the transaction, and, accordingly, threw the note into his desk with that design. During his absence, *M'Kim*, who had given a valuable consideration for the note, persuaded *Mrs. Levinz* to give it up to him, and afterwards sued *M'Farlan* upon it, who grounded his defence upon this, that the note was never delivered over.

Sergeant. Improper and false suggestions were used to induce *Mrs. Levinz* to deliver the note.

Ingersol. True: but the point in discussion was the delivery; and the Jury found for the Plaintiff.—*Cowp.* 206. Any proof of intention to assent to a delivery is sufficient;—no particular mode of action, no form of expression, are necessary. The present question, however, is, whether the Court will confirm the judgment as to the partner who sealed the warrant, and vacate it as to the other. The adverse Council have cited 2 *Bac. Abr.* 227. 358. to shew that the judgment, being an entire thing, must be wholly set aside, if at all. But this doctrine is fully refuted by 1 *Cro.* 322. 2 *Black. Rep.* 1133. With respect to the warrant's being executed while *Soyer* was in prison, it may be observed, that an Attorney was present; and in *Shuyter*'s case, the Court determined that it was not necessary the Attorney should be for the party; but that it was enough if the business was fairly transacted in the presence of an Attorney. Here neither fraud nor violence are suggested.

Lewis, on the same side, stated two questions: 1st. Whether, upon the facts, this judgment can be set aside as to both *Basse* and *Soyer;* and 2d. Whether it can be set aside as to one, and continued against the other?

1st *Point.* As this was a joint debt, justice naturally requires that the judgment should be confirmed; and it being admitted, that a contract not under seal made by one, would bind both partners, we allege that the seal creates no difference, for the *causa*

tractû is the sole criterion. Seals are of the same effect in *Lex Mercatoria* as at *common law*; and there is no authority to maintain the opposite doctrine; for, *Shep.* 69. is not the case of joint contractors. The books in general, where they speak of the obligation imposed on one partner by the contract of another, mention only notes, and whether under seal or not, is not distinguished. When we declare upon them, we allege the subscription of both partners, though, in fact, one only subscribes. Therefore, and because delivery is no farther necessary than as evidence of passing the interest, the first point seems determined in the negative. 1784.

2d Point. He observed that the several authorities quoted on the other side, were drawn from writs of error; and, as this record could not appear in its present form, if carried into a Superior Court, he inferred, that either the authorities were not applicable, or the record was to be considered upon the ground of a removal by writ of error: and in that case for error *dans le record*, the judgment must be wholly reversed; but when the error is *dehors*, the judgment may be reversed in part, and confirmed in part. 1 *Leon.* 317. *Cro. E.* 115. 3 *Lev.* 36. *Moore* 564. Besides, he contended, that the release of errors, contained in the warrant of attorney, purges and protects whatever might be deemed irregular with respect to *Soyer*; although it may not be sufficient to set up a void proceeding against *Basse*. 2 *Stra.* 1215. 3 *Mod.* 109. 6 *Co.* 25. *(a)*

Sergeant, in reply, made three points; 1st. That the bill of one binds both from the necessity of trade; but that the necessity does not extend, nor does the rule exist, in the case of deeds, and other specialties. 2d. That a judgment cannot be set aside in part, or against one only of the Defendants. Where, indeed, the different parts of the judgment are, in their nature separable, as in fines and common recoveries, mere modes of assurance, it may be done; and to those cases only the adverse authorities are confined. 2 *Bac. Abr.* 569. explains the mode of reversing judgments; and 2 *Bac. Abr.* 227. is so full upon the impartibility of judgments, that it cannot be too often insisted upon, in the present case. 2 *Black. Rep.* 1131. contains the same doctrine. 3d. The release of errors must be considered under the distinction in 3 *Mod.* 109. which shows that where divers *are to recover* in the personality, the release of one is a bar to all, but it is not so in point of *discharge*. 6 *Co.* 25, *(a)* is explicit, that, where two, or more, are charged jointly, if they bring a writ of error to discharge themselves, the release of one cannot bar the other; for, they have not any interest or benefit, but a joint charge and burthen, which cannot be discharged or released, unless by the Plaintiff who has the interest and benefit of it. If, therefore, *Soyer*'s release does not discharge the error, he concluded, that for the other reasons, the judgment must be set aside.

The PRESIDENT delivered the unanimous opinion of the Court, to the following effect:

SHIPPEN, *President*.—There can be no doubt that in the course of trade, the act of one partner is the act of both. There is a

1784. virtual authority to that purpose, mutually given by entering into partnership; and in every thing that relates to their usual dealings, each must be considered as the attorney of the other.* But this principle cannot be extended further, to embrace objects out of the course of trade. It does not authorize one to execute a deed for the other; this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication.

In the case before the Court, there is no dispute that the debt is not *bona fide* due to the Plaintiff. Nor can there be any, with respect to the validity of the warrant, against the person who has actually sealed it. Whatever, therefore, may be the fate of the judgment against *Basse*, we are, unanimously, of opinion, that it is, in every point of view, binding upon *Soyer:* And in conformity to the authority in 1 *Black. Rep.* 1133. (where the Court granted a rule to strike out the name of an infant, after judgment was entered, upon a warrant executed by him and another) we now give the Plaintiff leave to strike out the name of *Basse;* and the judgment against *Soyer* will remain.

Accordingly, judgment set aside as to *Basse*, and confirmed as to *Soyer*.

* See post. in S. C. *Whitehead* v. *Tillier*.

Supreme Court of Pennsylvania:

April Term, 1785.

DAVISON's Lessee *v.* BLOOMER.

A DEED, attested by two witnesses, one of whom had married the Lessor of the Plaintiff, the other residing within the county and not produced, was offered in evidence, upon proof of the hand writing of the writnesses.

Hartly objected, that it would be better evidence to prove the execution of the deed by the absent witness, not interested; and, therefore, this ought not to be allowed.

Yeates contended, that if a witness is incapacitated either by his own act, or by the act of God, proof of the hand writing is sufficient; as where a witness has been convicted of perjury.

By the Court.—There is a case in *Strange* where a party who was a witness to a bond afterwards became interested, and, although the proof of his hand writing was admitted, yet there must, likewise, have been proof that the other witness could not be found. The best evidence of which the case reasonably admits has not been offered; and, therefore, we cannot allow the deed to be read on this occasion.

1785.

TRACY *v.* WIKOFF.

IN this cause the CHIEF JUSTICE laid down the following rule in computing interest.

M'KEAN, *Chief Justice.* The rule of computing interest must be such, that the interest of money paid in before the time, must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payment. For instance, a bond to pay £.100, with annual interest at 6 per cent. and at the end of six months £. 50 is paid in. This payment shall not be apportioned, £. 3 to the discharge of the half year's interest, and £. 47 to the diminution of the principal; so as to calculate the remaining interest at 6 per cent. upon £. 53 for six months: but the interest shall be charged at the end of the year upon £. 100; the payment of £. 50 shall then be deducted from the aggregate sum of £. 106, and the obligor receive a credit for £. 1 10 as interest of £. 50 for six months.

125

WHARTON et al. *v.* MORRIS et al.

DEBT upon a bond. Plea, payment, with leave to give the special matter in evidence.

The case was this:—The Plaintiffs, copartners, sold to *Pleasants, Shore & Co.* merchants in *Virginia*, a considerable quantity of tobacco in March 1778, when the *Pennsylvania* scale of depreciation, estimates continental money at the rate of five for one. Articles of agreement were executed between the vendors and the purchasers, in which *Pleasants, Shore & Co.* covenanted to procure *Willing, Morris, and Inglis*, merchants of *Philadelphia*, as sureties for the payment of the tobacco; and, accordingly, a bond for that purpose was afterwards executed by those gentlemen, in the penalty of £.12,000 on condition to be void, if *Pleasants & Co.* should pay the sum agreed upon (that is £.7 per cent.) "*on the thirtieth of September* 1782 *in lawful current money of Pennsylvania.*" It appeared that *Inglis*, one of the Defendants, had offered to pay the value of the tobacco, at the time of the sale, with interest; but this was refused by the Plaintiffs; and no payment or tender, being made upon the 30th of September 1782, they brought the present action upon the bond.

The evidence was brief, consisting only of the articles of agreement, the bond, a deposition of the offer made by *Inglis*, and testimony that the usual price of tobacco, during many years preceding the war, was about 20*s. per Cwt.*

Wilcocks, Sergeant and *Lewis*, for the Plaintiffs, contended, that this transaction was a fair and lawful wager on the part of *Wharton & Co.* in confidence that the continental money would recover its original value; and that on the other hand they ran a

considerable risque; as, if it depreciated, they would have been bound to take it, provided it continued a legal currency. But the act which repealed the tender-law destroyed its currency; so that on the 30th of September 1782, when the bond became due and payable, the only *lawful current money of Pennsylvania* was coin, of gold or silver; and that by the terms of the bond ought to be paid. 1785.

Governeur Morris, *Wilson* and *Ingersol*, for the Defendants, denied that the transaction was founded in a wager; and contended that the Plaintiffs had set up a hard and unconscionable demand: for, they insisted, that the *lawful current money*, expressed in the bond, meant what was current at the time of its execution; and they declared the readiness of the Defendants either to pay at the rate established by the scale of depreciation, or according to the real value of the tobacco, with interest from the date of the sale.

M'KEAN, *Chief Justice*, delivered a circumstantial and learned charge to the Jury. He said, that the want of a Court with equitable powers, like those of the Chancery in *England*, had long been felt in *Pennsylvania*. The institution of such a Court, he observed, had once been agitated here; but the houses of Assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of encreasing, by that means, the power and influence of the Governor, who claimed it as a 126
right to be Chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, &c. This defect of jurisdiction has necessarily obliged the Court upon such occasions, to refer the question to the Jury, under an equitable and conscientious interpretation of the agreement of the parties; and it is upon that ground, the Jury must consider and decide the present cause.

His Honour, having recapituiated the evidence, concluded with the following observations.

The bond is made payable in current money of *Pennsylvania;* but, I would ask, what is the *current money of Pennsylvania?* For my part, I know of none, that can properly be so called, for current and lawful are synonymous. In *Great Britain*, the King by his proclamation may render any species of coin a lawful currency. But here, it can only be done by an act of Assembly; and except in the temporary laws for supporting the former emissions of paper-money, there is no pretence that the Legislature has ever interfered upon this subject. The expressions in the 2 *Sect.* of the act of the 27th *January*, 1777, cannot be construed to make the Spanish milled dollars a legal tender, as they are only mentioned by words of reference; but that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of Congress.

1785. To that species of money, therefore, the bond must be taken to relate; and the Jury will either reduce the penalty to gold or silver, according to the scale of depreciation; or, if they think it more equitable, they will find a verdict for the value of the tobacco, and give the Plaintiffs legal interest from the day of sale.

The Jury adopted the latter opinion, and found for the Plaintiffs with £.3,600 damages and 6*d.* costs.

WILSON's Lessee *v.* CAMPBELL.

EJECTMENT.—*Yeates*, for the Defendant, when called upon at the trial to confess *Lease*, *Entry and Ouster*, confessed *Lease*, *Entry*, *and Ouster* for *part only* of the tenements laid in the declaration.

This was opposed by *Bradford*, who contended, that the Defendant having taken general defence, when he first pleaded, and entered into the common rule, he must now confess *Lease*, *Entry* and *Ouster* as to the *whole;* but the Plaintiff can recover no more than he proves the Defendant to be in possession of. 1 *Att. Prac.* 317.

BY THE COURT: The Defendant must in this case, confess *Lease*, *Entry*, and *Ouster* for the whole tenements laid in the declaration.*

* This case was determined at N. P. *Carlisle* on the 16 *May*, 1785, before M'KEAN, *Chief Justice*, &c.

Common Pleas,

PHILADELPHIA COUNTY.

June Term, 1785.

SHOEMAKER *v.* SHIRTLIFFE.

DALLAS moved for a rule to shew cause why the execution issued in this action, should not be staid, till another action, brought upon the act of Assembly against Usury, by *Shirtliffe*, the present Defendant, against *Shoemaker*, the present Plaintiff, was determined.

The motion was founded upon an affirmation, which stated, that the Plaintiff and Defendant, having been concerned in trade, borrowed money from one *Anne Gibbs* upon an usurious contract; that *Anne Gibbs* became pressing for the payment of the money while the Defendant was out of town; that the Plaintiff thereupon gave her his separate securities to pay within a certain time; that upon the Defendant's return, he executed a bond and warrant of attorney to the Plaintiff, for his proportion of the debt due to *Anne Gibbs;* that the present execution is issued upon the judgment confessed by virtue of that warrant of attorney; that an action is depending against *Gibbs*, on the act of Assembly against Usury, and that the Defendant has also instituted a suit against the Plaintiff, upon the same act returnable to *September* term, 1785.

1785. It was suggested, in support of the motion, that the object of the execution was a share which the Defendant held in a vessel with the Plaintiff, and others; and that if this share was taken and sold, the Defendant would be in danger of losing satisfaction, if he recovered in the *qui tam* action which he had instituted against the Plaintiff.

Ingersol and *Sergeant* opposed the rule in the first instance. They contended, that, even admitting there had been an usurious contract between the parties to this suit and *Anne Gibbs;* yet, as it did not appear that any part of the money had been paid, no penalty was incurred; for, the words of the act are, that no person *shall receive or take.* They said, likewise, that although the consideration of the bond was originally usurious, the act of Assembly did not make it void; but only worked a forfeiture to the value of the thing or money lent; and that, therefore, without going farther, if the Defendant's cross action did not appear from his own stating well founded, it should not be made the instrument of delaying the Plaintiff's satisfaction.

Dallas asserted, that he was prepared to prove *Gibbs* had received a part of the money, and that therefore the Usury was complete. He argued, that if the original agreement be corrupt between all the parties, and so within the act, no colour would exempt it from the dangers of usury. 1 *Brownl.* 73. 2 *And.* 428. 4 *Shep. Abr.* 170. That it is not material whether the payment of the principal and the usurious interest be secured by the same or different conveyances, for all writings whatsoever for the strengthening such a contract are void. 1 *Hawk.* 248. *Cro. I.* 252. 508. That a second bond made after the forfeiture of a former, and conditioned for the receipt of interest according to the penalty of the forfeited bond, is within the statute. 1 *Hawk.* 248. 3 *Keb.* 142. That if a bond depends on some other deed, and that deed becomes void, the bond is void also. 2 *Wils.* 341. and that a fine levied, or a judgment suffered for the security of money in pursuance of an usurious contract, may be avoided by an averment of the corrupt agreement, as well as any parol contract. 1 *Hawk.* 248. 3 *Rol.* 509. He said that the Defendant did not wish to diminish the Plaintiff's security, but only to obtain a cessation of proceedings 'till the illegal consideration of the bond was ascertained by the event of the cross action; that if the consideration was illegal by statute, it was void by the common law; and, consequently, that the Defendant would then be entitled to recover from the Plaintiff as much as was now taken in execution. 2 *Wils.* 341. *Carth.* 225.

But BY THE COURT:—We cannot in this way enter into a consideration of the merits of another action. Nor ought we upon so slight a foundation to grant a rule to shew cause; for such rules by the delay which they occasion, are frequently as prejudicial to the Plaintiff, as if they were made absolute.

Dallas took nothing by his motion.

SCOTTIN *v.* STANLEY, *et al.*

JOHN M. TAYLOR had put a vessel on the stocks, and contracted with the different tradesmen. When the ship was a little advanced, he sold one half to *Stanley*, and one quarter to *Joseph Carson*, or rather interested them each so much in the concern. *Taylor* continued to be ship's husband, fitted out the ship, received the bills of disbursements, and was paid by the other partners their respective proportions of the building and outfits. While the ship was on her first voyage, *Taylor* failed—The Plaintiff, who was the painter, commenced this action against all three, *Stanley* and *Carson* refusing to pay his bill.

On the 12th of *August* the cause came on for trial. It did not appear in testimony when *Stanley* and *Carson* became interested; but it was admitted to be after the contract. The Plaintiff made his charges in his book "to Ship Hannah," and shewed, that on the 4*th* of *April*, *Stanley* and *Carson* had engaged a captain for the ship. The first item of his account was dated the 3*d* of *April* but all the rest after they had done this act of ownership.

Taylor offered to confess judgment, and *Sergeant* and *Sitgreaves* for the other two Defendants contended, that reference should be had to the time of the contract made, which being when *Taylor* was sole owner, the Plaintiff could resort to him alone; that no purchase made or interest acquired afterwards, could make *Stanley* and *Carson* liable for a contract made with *Taylor* only, and on *Taylor*'s sole credit, and that this case was particularly strong, it being proved that they had each paid their proportions already to the ship's husband, *Taylor*.

But SHIPPEN, *President*, instructed the jury, that as the work was performed after they had become owners, and appeared avowedly so, it was certainly done on their credit; and not only the ship's husband, but all the real owners at the time of the work done, were liable.

Lewis, for the Plaintiff, cited and relied on *Cowp.* 636.

Verdict for the Plaintiff.

BUCKLEY *v.* DURANT.

THIS was an action of Trover.—*Non cul.* pleaded, and issue—Afterwards the cause was referred, and report made, "That "Plaintiff pay to Defendant £.3; upon which payment being made, "Defendant to restore to Plaintiff certain articles, for Trover and "Conversion of which the action was brought." Judgment *nisi* had been entered on this report, and now *August* 13, 1785, *Lewis*, for the Defendant, offered to state his objections to the confirmation of the report. *Sergeant* and *Bankson* objected to going into the argument, and insisted that judgment should be made abso-

1785. lute, because no exceptions to the report had been filed in writing, which they contended ought to have been done, within four days from the entry of the judgment *nisi*. *Lewis* admitted, that where the exceptions arose from facts, such as misbehaviour of the referrees, want of notice, &c. it was necessary that they should be in writing; but insisted, that where the objections arose from the face of the report, as in the present case, and depended upon construction of law, there was no such necessity. And accordingly THE COURT permitted him to proceed.

He took three exceptions:

1st. The act of Assembly giving references by rule of Court in actions depending, puts the report of referrees on the same footing precisely with the verdict of a jury. Now, in Trover a verdict can never be for restoration of the specific chattels, but for damages only, and such a verdict would be error: therefore he inferred the same law in the case of a report.

2dly. The report, on the face of it, shews the action of the Plaintiff to be illegal—for Pawnee has a right to detain his pledge, until payment of the sum for which the pledge was given; and until such payment, Pawner can have no action to recover the thing pawned, or damages. Now the report finds £. 3. due from the Plaintiff to the Defendant, which at once defeats his right of action, and shews that judgment should be for the Defendant.

3dly. A report should be such a one as that the Court may give judgment, and award execution thereon. Judgment cannot be for both Plaintiff and Defendant on one issue; and this report gives something to each—it is a report on both sides—Judgment and execution can be only for one.*

THE COURT inclined strongly to be of opinion with *Lewis*, particularly on the first point; but no judgment was given, that the parties might, if they would, accommodate the matter by a new reference: and, accordingly, it was afterwards referred *de novo*.

CARREW *v.* WILLING.

CAPIAS to *June*, 1784. The bail bond sued to *September*, 1784; and *December* 1784, judgment was signed on the bail bond suit, *nisi* special bail filed in 30 days. Default was made in filing special bail, and a *fi. fa.* issued to *June* 1785.

* Mr. *Sergeant* mentioned, that on a former argument of this cause, this exception was combated by an observation, that even if judgment could not be entered on the report according to the common forms, yet the reference being made under the eye of the Court, they would grant an attachment to compel compliance with the report, and the case of *Ralston* v. *Stewart* was mentioned, where the *Supreme Court*, it was said, established this point. Time had been given to the Plaintiff's council to search for notes of this case; and no note being now produced, Mr. *Lewis* said, that although he was concerned in that cause with the gentleman who cited it (Mr. *Sergeant*) yet he could not remember that any such point had been adjudged, and contended that the act of Assembly gave no such authority, and that no instance of such an attachment had ever been known in our practice. *Keeper* v. *Stuart*, cited post. 365.

And now, *August* 8, 1785, *Sitgreaves* filed Defendant's affidavit of a just defence, and obtained a rule to shew cause, why the proceedings in the bail bond suit should not be stayed on paying costs, pleading issuably in the original action, taking short notice of trial, and consenting that the judgment on the bail bond should stand as a security. He cited *Barne*'s *notes* 74. *Birch* v. *Graves*. *ib.* 85. *Otwry* v. *Cockayne*. *ibid.* 91. *Seaber* v. *Powell*. *ibid.* 112. *Morley* v. *Carr*. 1785.

On the 13th of *August*, *Sergeant*, for the Plaintiff, shewed cause; but, after argument, the rule was made absolute.

CAMPBELL *v.* RICHARDSON.

THE Defendant had been bail for his brother, who suffering judgment to go against him, a *scire facias* was issued against the Defendant, and in due course judgment thereon—In the interim, between the recognizance of bail and judgment on the *scire facias*, several judgments were obtained against the Defendant by his proper creditors, executions issued, and his real estate was seized and sold. But the proceeds not being sufficient to satisfy all the judgments, the Sheriff brought the money into Court, to be disposed of as the Court should direct.

Sergeant, for the Plaintiff *Campbell*, insisted, that recognizance of bail is a lien upon the land from the date of the recognizance, and, therefore, claimed a preference to all judgments afterwards obtained, although they might be previous to the judgment on the *scire facias*—He cited to this purpose, *Stat.* 29. *Car.* 2. *c.* 19. 2 *Bac. Abr.* 363. 365. 10 *Vin.* 559. 563. 2 *Salk.* 564. *Cro. Eliz.* 551. *Ingersol*, on the contrary contended, that *Campbell* should only have preference from the date of the judgment on the *scire facias;* and argued from the statute of frauds and our act of Assembly ascertaining the mode of paying the debts of decedants, and cited 1 *Peer. Wms.* 333. *Cro. Jac.* 449.

After consideration, the PRESIDENT delivered the opinion of the Court, on the 26th of August.

SHIPPEN, *President.*—This is a question concerning the binding nature of a recognizance of bail, as to the lands of the bail; and whether, in *Pennsylvania*, a prior recognizance creditor, or subsequent judgment creditors, shall have the preference.

From the cases cited, it appears, that, although lands in *England* are bound by recognizance, yet there is some uncertainty as to the time from which they are bound: whether from the *caption*, or from the *inrolment* of the recognizance; or from the *judgment* against the principal; or from a *non est inventus* returned upon the *Ca. Sa.* And several of the cases which mention that lands

1785. are bound upon the *caption*, are since the statute of frauds, which says that the lien shall be from the *inrolment*.

I do not find that there have been any legal decisions upon this point in *Pennsylvania;* but a general opinion has taken place, which has been carried into universal practice, that recognizances do not here bind lands, until they are proceeded upon to *judgment* against the bail. Hence it is, that, whenever a purchase, or mortgage, is made, the examination at the offices, and the certificates which are given by the prothonotaries, are only of the *judgments* in force against the seller, or mortgagor, and not concerning *recognizances*. The practice has, indeed, been so general, that all the conveyancers and lawyers, for a long course of years, have, on such occasions, confined their enquiries to that circumstance alone; and many titles must, therefore, depend upon it, which would be shaken if a contrary construction should now be adopted.

Whether this opinion took its rise from the different situation in which the lands of this country are from those of *England*, and from their being liable to be *sold* for debts; or from the silence of the Legislature upon the subject; or from what other cause, we can but conjecture. It is remarkable, however, that when our act for the prevention of frauds was made, in the year 1772, although the Legislature copied the clause in the *English* statute relating to judgments, and was minutely exact as to the time from which they should bind lands, yet they totally omitted the clause relating to recognizances. This silence, it is true, is no abrogation of a law; but it looks as if the Assembly had taken up the popular idea, that recognizances did not bind till judgments were obtained upon them, and, therefore, they thought that no particular provision was in that respect necessary. Upon what principle, indeed, could they else have been so careful of innocent purchasers in the one case, and not in the other?

We may also properly take into view, that, long before the passing this act for the prevention of frauds, the relative dignity of judgment debts, and of those upon recognizance, had been settled by a law, directing the order of paying the debts of persons deceased. That is—1st. Physic and funeral expences.—2d. Debts and duties to the Queen.—3d. Debts due to the proprietor and governor.—4th. *Judgments*.—5th. Debts due by *recognizances*.—6th. Rents, &c. If, however, it should be said, that this is only a direction in what order debts shall be paid, without any respect to the binding nature of judgments and recognizances, it may be answered, that, from the situation of lands in this country, that consideration must necessarily be included. Here, as I have already observed, lands are chattels for the payment of debts; they are chattels too in the hands of executors; and all writs of *fi. fa.* direct the levy accordingly to be made, of the goods and chattels, *lands* and *tenements* of the deceased, in the hands of the executor. If, then, in such a case, two writs are executed upon lands, founded, one upon a prior recognizance, and the other on a judgment

subsequent to the recognizance, but prior to the judgment upon it, the Court must clearly decree a preference to the judgment creditor. This seems indeed to be a legislative direction as to recognizances in similar cases; for, what confusion would arise, from supposing the lands of *deceased* persons to be bound from *one time*, and the lands of *living* persons from *another?* 1785.

Upon the whole, we think, that great mischiefs and dangers would be imposed upon honest purchasers, if at this time of day, we should unsettle what has been so long the general opinion and practice on this subject. Therefore,

Let the Plaintiff take preference only from the date of the judgment on the *scire facias*.

SHOEMAKER *v.* SHIRTLIFFE.

THE Defendant had executed a bond, with warrant of attorney to confess judgment to the Plaintiff. The bond was payable on the 1st of *September* 1785; but there was no provision for a stay of execution, till that time, inserted in the warrant of attorney. The Plaintiff issued a *fi. fa.* before the 1st of *September*, and *Dallas*, for the Defendant, moved to set it aside.

THE COURT were of opinion, that the warrant of attorney reciting the bond, was only an instrument subservient to it; and, consequently, that the execution could not be issued, till the time given for payment was expired.

The execution set aside.

BURROWS *v.* HEYSHAM.

SCIRE FACIAS against the bail, and the judgment removed by writ of error. Upon the issuing of a *certiorari* to bring up the record, the Plaintiffs moved to amend the *scire facias* by the record, substituting *September* 1782 for *December* 1781. The motion had been argued at the last term, and now came on for a second argument.

On the part of the *Defendant*, it was said, that as the cause had been removed, by writ of error, this Court had no longer any jurisdiction over it; but this objection was not insisted upon. *Doug.* 150. 110. and *Cowp.* 841. 844. had been cited for the Plaintiff on the former argument; but these were cases of ejectment; and it would overset the law, if other points were to be brought within the principle, by which ejectments are regulated. With respect to amendments by the statutes of *Jeoffaille*, they were only in matters

1785. of form; but the present motion went to matter of substance, and, therefore, ought not to be granted. The bail, if the judgment is misrecited in the *scire facias*. is entitled to relief by writ of error. *Salk.* 52. *L. Ray.* 1057. *S. C.* 6 *Mod.* 263. 2 *Stra.* 1165. *Gilb.* 136.

For the *Plaintiff* it was answered, that, independent of the statutes of *Jeoffailles*, this might be amended. It is a rule at common law to amend, whenever there is any thing to amend by. 5 *Burr.* 1730, was matter of substance, yet amended; because there the rest of the pleadings rectified the error. That, likewise, was a case after a writ of error had removed the record, and there had been an argument in the *Exchequer*. Here the error appears on the face of the writ, which recites the judgment to have been prior to the date of the recognizance; and in this point it is distinguishable from *Salk.* 52. *L. Raym.* 1057.

On the 20th of *August*, the PRESIDENT delivered the opinion of the Court.

SHIPPEN, *President*. As it has not been made any part of the argument, that the power of the Court to amend, is not the same, as it was before the action was removed, we shall determine the question as we should have done, if the writ of error had not been brought. Upon the liberal principles of modern practice, therefore, and indeed, for the honour of common sense, we think it incumbent upon us to direct the *scire facias* to be amended by the record. Besides the cases in the books (particularly that in *Barnes*. 6 *Sweetland* v. *Beezely*) there are some instances in our own Courts that authorize this determination. I remember in *Scott* v. *Galbraith* at *nisi prius*, in *Lancaster*, a verdict was given for the Plaintiff in ejectment, for one half of the premises, and nothing was said respecting the other half. A motion was made in *Bank* to set aside this verdict, but it was allowed to be amended, by adding, "and for the residue they find for the Defendant;" although, in that case, there was not any thing to amend by, but merely what was implied in the verdict.*

The rule made absolute.

* See 2 *Dall. Rep.* 184.

Supreme Court of Pennsylvania:

September Term, 1785.

GEYGER *v.* STOY.

THE Defendant was brought before the Court on a *hab. corp.* and the return stated, that he was committed in execution by the warrant of a *Justice of the peace* for a debt of £. 10 6 3.

Sergeant moved that he should be discharged, on this principle, that although the errors of a Justice, while he keeps within his jurisdiction, are binding, 'till his judgment is reversed; yet where he exceeds his jurisdiction, all his acts are, in themselves, merely null and void.

BY THE COURT.—It appearing upon the face of the record, that the Justice has exceeded his jurisdiction, by giving judgment, and issuing an execution, for a greater sum than *ten pounds*, we cannot but consider the whole as a nullity; and, for that reason alone, discharge the Defendant.

JACKSON *v.* MASON. JACKSON *v.* KEELY.

THESE causes were marked for trial this day. *Lewis* for the Defendant tendered the affidavit of *Mason*, the Defendant in the first action, of the absence of a material witness. *Bradford*, for the Plaintiff, desired, on the authority of the *Chev. D.*

1785. *Eon's case*, 3 *Burr.* 1514, that the Court would enquire what would be the testimony of the absent witness, in order that it might appear whether he was *really* material.

But this THE COURT refused, and ordered the cause to be continued.

Bradford then moved, that the action against *Keely* should be tried; insisting that the affidavit of any person, but the Defendant himself, was insufficient to delay a trial; and he cited *Barn.* 437. *Carter* v. *Uppington*, and *Gray* v. *Holton*.

But it appearing to THE COURT, that both actions were brought on one note of hand, in which *Mason* was the drawer, and *Keely* the indorser, and, consequently, that *Mason* was liable over to *Keely*, he was considered as eventually interested in both actions; and therefore both the trials were postponed on his affidavit alone.

GRAHAM's APPEAL.

THIS was an appeal from the Orphan's Court of *Philadelphia;* and after argument, the CHIEF JUSTICE delivered the unanimous opinion of the Court to the following effect:

M'KEAN, *Chief Justice.* The intestate had left seven children, all under the age of fourteen years; their mother married the *Baron* appellant. Upon petition to the *Orphan's Court* by the children, for the appointment of guardians, *Enoch Edwards* and another were appointed. This appeal is founded upon an idea, that the guardian *in soccage*, or by nurture, must be appointed, and that the *Orphan's Court* have not a discretion.

In *England*, the next of kin, to whom the inheritance cannot descend, must be appointed guardian, the mother therefore would have been entitled to the appointment there; but in *Pennsylvania*, it depends on the 7 and 12 §. of the act of 12 *Anne*, c. 3. And we all agree that by the true construction of these sections, the *Orphan's Court* have a power to assign the guardianship of minors under fourteen, to whom they please, according to their legal discretion; which legal discretion by § 12. is confined to the choice of persons of the same religious persuasion, of good repute, and approved by the orphan. If any of these objections should occur, the Court must appoint some other persons; which could not be the case, if they were confined to the guardian in soccage, or by nurture.

The opinion of the Court is conformably to the invariable practice in every county of the state, from the date of the act to this day; and the construction given to an act immediately after it has passed, cannot be altered at so distant a period, even although it might have been a little erroneous in the first instance.

The order of the *Orphan's Court* confirmed.

VANHORN's *Lessee v.* HARRISON.

1785.

THIS was an ejectment brought for a messuage and plantation, in *Bensalem* township, in *Bucks* county. A case being stated, it was thrice argued by *Sergeant* and *Bradford*, for the Plaintiff, and *Lewis* and *Wilcocks* for the Defendant.

The CHIEF JUSTICE now recapitulated the material points, and delivered the opinion of the Court as follows:

M'KEAN, *Chief Justice.* This cause comes before the Court on a case made for their opinion. The case is long, and has stated several particulars, which can have but little influence upon the decision.

The material facts are: That a certain *Johannes Vandegrift* was seized in fee of the premises in question, and, being so seized, by his last will and testament in writing, dated the 16*th March*, 1732, devised the same unto his eldest son *Abraham* in fee-tail, with remainder in fee to all his other children. And afterwards, by a deed or instrument in writing, sealed and delivered, bearing date the 31*st of August* 1743, "In consideration of natural "affection, he gives, grants, &c. fully, freely, absolutely and "clearly, the same premises, to his son *Abraham Vandegrift*, to-"gether with all the rights, titles, interest, claim and demand "whatever, which he then had in the said granted premises, or "any part thereof, To have and to hold unto him only the said "*Abraham Vandegrift*, without any further condition, as he had "fully, freely and absolutely, and of his own accord set and put "in further testimony, &c."

If this conveyance passed a fee to the son *Abraham Vandegrift*, then judgment must be for the Defendant; but if an estate for life only, then judgment must be for the lessors of the Plaintiff: For, suppose the will of *Johannes Vandegrift*, which was executed prior to the conveyance, is taken into the case, yet the son *Abraham* had thereby only an estate-tail, which is spent by his death, without heirs of his body lawfully begotten.

When this case was first argued, the Council on both sides considered it only in two points of view, *to wit*, *First*, Whether the conveyance from *Johannes Vandegrift* to his son *Abraham* was to be construed as an original conveyance at common law, or as a covenant to stand seized to uses? And, *secondly*, What was the intention of the parties, as to the estate which was to pass?

Mr. *Sergeant* contended, that it was an original conveyance at common law, and let the intention of the parties be what it may, it could only pass an estate for life to the son, for want of proper words of inheritance.

Messrs. *Wilcocks* and *Lewis* insisted that this deed must be considered, a covenant to stand seized to uses, and that it should receive the like construction with a will, that is, to be governed by the intention of the parties. In support of their first position, "that it must be taken to be a covenant to stand seized to uses," they cited, 2 *Wilson* 22. 75. *Carthew* 38. *Comberbach* 128. *S. C.*

1785. 10 *Mod.* 35. 36. 1 *Atkyns* 8. 1 *Mod.* 175. 2 *Levinz.* 10. 3 *Levinz.* 372. 1 *Bac.* 274. For the second position, they cited, *Carthew* 843. 1 *Co.* 100 *b.* 101 *a. Littleton*'s *Rep.* 347. 5 *Mod.* 266. And they concluded, that if this instrument had been a will, it would appear manifestly to be the intention of the parties to pass a fee; for which they cited, 6 *Mod.* 109, 110. *Cro. Car.* 450. 1 *Ld. Raymond* 187. 2 *Will.* 524.

Mr. *Sergeant*, in his reply, said, that the deed of 1743 must operate as a feoffment, and relied upon the following authorities. *Co. Lit.* 9. *a.* 1 *Vol. Pennsylvania Laws*, *pa.* 78. *Prec. in Chan.* 580. *Lilly*'s *Conveyance* 613. 614. 646. 2 *Inst.* 672.

Upon hearing this argument, and reading the books that had been cited on both sides, and full consideration of them, it appeared to me, that this deed, or instrument, ought to be taken as a covenant to stand seized to uses, and that the law has been long settled, that a deed shall be construed either as a common law conveyance, or a statute conveyance, if it can be taken both ways, as will best tend to give it all the effect the parties intended. This deed then has every requisite necessary to constitute a deed of covenant to stand seized to uses. 1*st.* Here is a sufficient and proper *consideration*, *viz.* natural affection. A consideration may be either a good, or a valuable one. A *good* consideration is that of blood, or natural affection, or love; as when a man grants an estate to a near relation, as in this case, to his eldest son. Blood or marriage are the most common and suitable considerations in this species of conveyance. The *valuable* consideration is such as money, marriage, or any other equivalent given for the grant. 2 *Black.* 297. 336. 2*d.* It is a *deed.* 3*d. Johannes Vandegrift* was seized *in fee.* 4*th.* Here are *apt words to convey lands;* and the word grant, which is in the deed, has been adjudged in the case of *Wilkinson*'s lessee v. *Farmer*, &c. (2 *Wilson* 175. 1 *Mod.* 175.) sufficient of itself, to create a covenant, and to raise an use. These are all the circumstances necessary to make a good deed of covenant to stand seized to uses.

As to the other point:—How this conveyance was to be construed, whether as a deed at common law, or like a will, according to the intent of the parties? I was, at first, of opinion, from the general doctrine laid down in all the books cited at the bar, that the intention of the parties was to govern in the same manner as in a will; and of that intention I had no doubt; for by the words used in the *premises*, if unrestrained by the *habendum*, it appeared manifestly, that *Johannes Vandegrift* had given all his right, title, interest, claim and demand whatsoever, which he had in the land, unto his son *Abraham*, freely, absolutely, and clearly, &c. which words in a will would unquestionably pass a fee. But having, afterwards, met with two cases in 4 *Burn*'s *Ecclesiastical Law*, *pa.* 110. *and* 118. I hesitated. A second argument was, therefore, had on the 18*th of December* last, when the question, that alone admitted of controversy, *to wit*, how far this deed of covenant to stand seized to uses, should be construed like a will, was fully considered by Mr. *Bradford.* He contended, that it required such *technical words*, as are used and

necessary in deeds at common law to pass an *inheritance*, that in all deeds the word *heirs* is necessary to pass a fee; this is the *general* rule, and though there are exceptions, yet this species of conveyance to uses is not among them; which appears 1*st*, from the silence of approved writers on this subject. To shew which he cited, 2 *Black.* 108. *Bac. Abr.* 252. 3 *Comyn*'s *Digest.* 214. *Shepherd*'s *Touchstone of Assurances*, *fo.* 101. (97, *of new edition*) *Co. Lit.* 9. 2*dly*. From a variety of express and positive authorities. 3 *Black.* 370. 1 *Co.* 87 *b. Co. Lit.* 10. *a. Shepherd*'s *Touchst.* 102. 106. 1 *Comyn*'s *Digest.* 543. 1 *Co. Rep.* 100. *b. Gilbert*'s *Uses and Trusts* 75. 76. And 3*dly*, that words, essential to convey a fee in a deed at common law, are necessary since the statute of uses, 27 *Hen.* 8, *ch.* 10. in a covenant to stand seized to uses. To prove which he cited 5 *Bacon* 357. 1 *Rolls Abr.* 837. *Cro. E.* 478. 2 *Lill. Reg.* 112. *Sir Thomas Raym.* 317. 2 *Ld. Raym.* 1151. 2. 4. *&c.* 1785.

We have since heard the Council for the Defendant in answer, who chiefly dwelt upon the deed of 1743 having a *relation* to the estate which the covenantor had, that he having a fee, had by relative words conveyed that fee to his son; and they relied upon 2 *Comyns* 215. *Shep. Touchst.* 101. *Co. Lit.* 9. *b.*

Upon the whole, THE COURT have, unanimously, formed the same opinion as the Plaintiff's Council, after the most mature consideration.

1. This deed is a covenant to stand seized to uses.

2. Before the statute of uses, viz. 27 *Hen.* 8. *ch.* 10, this deed would have passed a fee, 1 *Co. Rep.* 100. *b. Shelley*'s *case*, though the word *heirs* is not in it. But since that statute, the limitation of uses is in many cases governed by the rules of common law; and no inheritance, in a covenant to stand seized to uses, or other deed to uses, can be raised, or new estate created, without the word *heirs;* because the uses are now transferred into possession, and therefore must be governed by the rules of possession at common law. 5 *Bacon*'s *Abr.* 350. 356. and the cases there cited. And at common law, though the intent of the parties be ever so fully expressed and manifested in a grant or other deed, without the word *heirs*, a fee shall not pass. 6 *Mod.* 109. 2 *Vezey* 252. 1 *Wilson* 351. 2 *Blackst. Reports.*

3. There are no words in this deed, either technical or relative, that can raise a fee, and consequently *Abraham Vandegrift* had thereby only an estate for life in the premises.

Let judgment be entered for the Plaintiff.

M'CULLUM *v.* COXE.

THE Jury were at the bar to try the issue in this case, when *Levy* moved to discontinue, in consequence of a Power of Attorney granted by the Plaintiff for that purpose. But it was opposed by *Ingersoll* in behalf of General *Forman*, to whom, for a va-

1785. luable consideration, the Plaintiff had assigned the debt, and the Defendant had undertaken to pay it to him accordingly.

These facts being made to appear, THE COURT said they would not allow any collusive settlement between the original parties, to affect General *Forman*'s *bona fide* assignment, and ordered the Jury to be sworn. And M'KEAN, *Chief Justice*, observed, that where an action was brought under such circumstances, it ought to be mentioned upon the docket for whose use; a practice which had always prevailed when he was at the bar.*

MORRIS *v.* DE MARS.

IT was ruled in this case, that a relation of a superior and inferior officer, does not, of itself, bind the former to pay the contracts of the latter, whether in the staff or line. But if the inferior officer had an authority to contract, and having obtained money for the use of the army, applied it accordingly, in such case THE COURT inclined to think, that the superior would be liable for the debt, provided he had sufficient public funds to discharge it.

* See 2 *Dall. Rep.* 172. *in note.*

Common Pleas,

PHILADELPHIA COUNTY.

September Term, 1785.

WOODS *v.* COURTER, *et. al.*

THE register of a ship, or, in other words, an affidavit made by one of the Defendants (who, however, was not in Court, the return, with respect to him, being *non est inventus*) stating that the ship belonged jointly to him and other persons, being copied from the books of the naval officer, and certified under his seal of office, was allowed, after argument, to be read in evidence against the Defendants.

And SHIPPEN, *President*, mentioned the case of the protest of a master of a vessel, which had been allowed to be evidence in his favour. See *ant.* 6.

The Defendant's Council took a bill of exceptions to the opinion of the Court, which, however, was never prosecuted, as the Plaintiff eventually suffered a nonsuit.

Lewis for the Plaintiff.—*Sergeant* for the Defendant.

1785.

MIFFLIN *v.* GASQUI.

A DEBTOR in confinement under a *Magistrate's execution*, petitioned for his discharge under the insolvent laws. But he was remanded, because he had not applied before the adjournment; THE COURT observing, that it was already easy enough for debtors to get out of gaol.

DORROW *Assignee v.* KELLY.

THIS came before the Court on a case stated; in substance as follows:

On the *5th* of *March* 1782, a mortgage was executed by *Abel Kelly* to *Thomas Groome* and his assigns, for securing the payment of £. 47 4 0 with interest on the *5th* of *March* 1783. On the *9th* of *August* 1782, the mortgage was assigned for a valuable consideration to *John Dorrow*; who sued out a *scire facias* to *June* Term 1784, the day of payment being past.—After the assignment, and before the *scire facias* sued, *Kelly* became indebted to the said *Dorrow* by notes and book accounts in divers sums, which still remain unpaid and payable.

Ingersoll, for the Defendant, had obtained a rule to shew cause why the proceedings on the *scire facias* should not be stayed, upon payment of the principal mortgage money, interests and costs only; without payment of the subsequent simple contract debts?

Lewis, for the Plaintiff, shewed cause, and stated from the books the law on the subject in *England*:—That it is presumed the subsequent simple contract debts, were contracted on the faith of the first security, though no special agreement for the purpose; that after the day of payment, the mortgaged premises are forfeited in strict law; the privilege of redemption afterwards is a matter of equity, which shall be withheld until the mortgagor does equity by payment of all debts; that it prevents a multiplicity of suits, and effectuates substantial justice. And he contended that in *Pennsylvania*, the chancery jurisdiction for redemption of mortgages, is transferred by the act of Assembly to the common law courts, which will also take care that he who claims equity shall do it. He cited a great number of cases, both as to the reasons and conclusions of the law. 3 *Peer. Wms.* 334. 3 *Atk.* 556. 630. 1 *Chan. Cases* 97. 2 *Vern.* 286. 2 *Chan. Cases* 98. 2 *Vern.* 177. *Prec. Chanc.* 18. *Gilb. Rep. in Eq.* 104. *Prec. Chanc.* 419. 16 *Vin.* 264. 5. 1 *Peer. Wms.* 775. 6. 1 *Vern.* 244. 4 *Salk.* 240. 1 *Eq. Cas. Abr.* 325. 2 *ibid.* 594. *Gilb. Rep. in Eq.* 96. *Max. of Eq.* 1 *Treatise of Eq.* 89. 90.

Ingersoll read some authorities to shew, that even in *England*, the law on the subject is not thoroughly settled. 2 *Stra.* 1107. *Eq. Cas.* 359. 3 *Bac. Abr.* 651. *Prec. Chanc.* 407. 419.—But, conceding it to

be as stated by the opposite Council, yet, he contended, that it is very different in *Pennsylvania*. Our act of Assembly (*Prov. Laws* 51.) puts mortgages on quite another footing:—For, 1st. Mortgagee cannot proceed on the mortgage until one year expires after day of payment elapsed. 2d. Even then a process is directed by the act, altogether different from that which is practised in *England*, and which does not go to vest the legal estate in the mortgagee. 3d. In fact, the mortgagee cannot by any default of the mortgagor, however long, or reiterated, acquire a right to more than principal, interest and costs, for the amount of which he has an absolute and special lien on the mortgaged land, and for the payment of which the said lands are to be sold on execution (after judgment on the *scire facias*) in the usual way. And the act for acknowledging and recording of deeds § 9, 10. (*Prov. Laws* 79) directs under a heavy penalty, that upon payment made *as aforesaid*, the mortgagee at the request of the mortgagor, shall acknowledge satisfaction on the margin of the record of the mortgage, which acknowledgment shall be a bar to all actions *brought or to be brought on the mortgage*, and shall for ever discharge, defeat, and release the same. He then read the law of mortgages in *England* from 2 *Black. Comm.* 157. and contrasted it with our act of Assembly. In *England*, after day of payment past and foreclosure, the land is absolutely in mortgagee without any possibility of recal; it ceases to be a pledge, and becomes to all intents and purposes the absolute property of the mortgagee. In *Pennsylvania*, there is no such thing as foreclosure, the land mortgaged never ceases to be a pledge; a legal estate never vests in the mortgagee, nor can he by any possibility become owner of the land, unless he purchases under the execution. Hence, it must appear, that the reason of the *English* cases cannot apply in *Pennsylvania*. Relief is given to the mortgagor in chancery, expressly because he is remediless at law; and, therefore, they will grant the equity upon what terms they please. In *Pennsylvania*, the act of Assembly precludes all necessity for such an interference. The privilege of redemption after the day of payment past is not properly speaking an equity, and therefore the principle of the chancery cases cannot exist. Another reason why the *English* cases do not apply is, that, in *England*, real estate is not answerable for simple contract debts; and, therefore, chancery, in favour of such creditors, will cover them where they have it in their power; but here the simple contract creditor can come on the land even in the hands of the heir. If the rule should be extended to *Pennsylvania*, the most mischievous consequences would ensue to purchasers. It would be in vain for them to search the offices to see to what amount a tract of land may be encumbered by mortgages; because, however accurate he may be in his calculation and comparison of the value of the land with the amount of the mortgage debts, an infinity of intermediate simple contract debts may swallow up the whole difference.

1785.

Lewis observed, in reply, that the mischief suggested by his opponent need not be apprehended, because all the cases agree, that

1785. the alienee of the mortgaged premises shall not be liable for more than the mortgage debt, though it is otherwise with the mortgagor himself. As to the idea that in *Pennsylvania* a mortgage is in nature of a common pledge, we find that the authorities extend even so far. *Demanbry* v. *Metcalf*, *Gilb. Rep. in Equ.* 104. S. C. *in Prec. Chanc.* 419. is the case of jewels pawned, which were not permitted to be redeemed, without payment of the pawner's subsequent note of hand. And, with respect to the present point, the act of Assembly has no other effect, than to extend to our law courts the power of redemption which chancery has in *England;* for, if there was no such power, upon default on the day of payment, the mortgagor would be without remedy.

After consideration, THE PRESIDENT delivered the opinion of the Court as follows.

SHIPPEN, *President.*—The case comes before us on a rule to shew cause, why the proceedings on a *Scire Facias* on an assigned mortgage, should not be staid, on payment of the principal and interest due on the mortgage? It is contended, on the part of the Plaintiff, that a subsequent debt having been contracted with the assignee of the mortgage, the rule should not be granted, till such subsequent debt be first paid.

Being a Court of Law, we cannot take upon ourselves to act as a Court of Chancery. We have no power to foreclose the equity of redemption, or to impose terms upon a mortgagor applying to redeem. The *Courts of Law* in *England* have never done it, but under the act of Parliament of 7 *G.* 2. *c.* 20. made for the more easy redemption and foreclosure of mortgages. Under this act, when an ejectment is brought for the recovery of lands mortgaged, if the mortgagor shall become Defendant in the ejectment, and shall at any time pending the action pay the principal and interest money due on the mortgage, or bring it into Court, such money shall be taken in full discharge and satisfaction of the mortgage, and the Court shall discharge the mortgagor and compel the mortgagee to surrender and re-convey the mortgaged premises. There is a case under this act which has not been cited at the bar, and which is rather fuller to the point, than any that have been cited: It is in 2 *Barn. No.* 147. where "a rule on the statute of 7 "*G.* 2. to shew cause why proceedings should not be staid on "payment of the motgage-money and costs, was made absolute; "the lessors of the Plaintiff, *assignees* of the mortgagee, insisted to be paid a bond and simple contract debt due to themselves in their own right:—*Per Curiam:* a bond is no lien in "equity, unless when the heir comes to redeem."

The Courts of Law in this state, have in some instances adopted the chancery rules, to prevent the absolute failure of justice. But in this case, there is no necessity to usurp the powers of a Court of Chancery. We have a positive act of Assembly directing the mode of proceeding upon mortgages, intirely different from the

modes prescribed in *England*. This act expressly confines the remedy of the mortgagee to the recovery of *the principal and interest* due on the mortgage; and the proceedings under the law shew the uniform construction of it. The *Scire Facias* is to shew cause why the land should not be sold for payment of the *principal and interest* due on the mortgage: When judgment is obtained, the *Levari Facias* is to levy *the principal and interest money only*. There is no penalty, no judgment for a penalty, and we might as well refuse to stay proceedings in a suit on *a single bill*, till a subsequent debt was discharged, as in this case of a mortgage. Upon the execution in both cases, no more can be levied than the principal and interest. 1785.

Rule made absolute.

BROWN *v.* SCOTT *et al.*

RULE to shew cause why the report of referrees should not be set aside. The facts were these:—Four actions had been brought upon four promissory notes, and the parties, being willing to refer them, by a written agreement entered a fifth action on the docket, in order to take in another note, which had become due since the return of the preceding writs; and accordingly the whole were referred to persons nominated by the Court, a rule for that purpose being taken out in each action. The parties were heard before the referrees, and the report agreed upon, when a difficulty occurred, how to apportion the sum that was found due, or in what manner to make the report, if it was not apportioned. The referrees, therefore, applied to a gentleman of the law, who advised them to connect the five rules, and make one general report, for the whole sum. Conformably to this advice, the following report was made. "We the referrees appointed in the annexed five rules of Court to hear and determine the matters in variance between Plaintiff and Defendants in the five several actions commenced by the former against the latter, do adjudge that the Defendants are indebted to the Plaintiff £. 1301 3 11, and that the same ought to be paid accordingly." All the referrees signed the report, and two of them attended in Court, and gave testimony, that both parties were fully and patiently heard, and no objections were made, on either side, to the mode of proceeding. Nor was there any suggestion in the course of the argument, that the referrees had acted with partiality, injustice, &c.

The motion was supported by *Ingersol*, *Coulthurst* and *Heathy*, for the Defendants, and they contended, that the report was neither certain, mutual, nor final.

1st. For that the report says £. 1301 3 11 is to be paid "accordingly"—accordingly to what? the mode of payment was a chief part of the dispute; and this was left *uncertain*.

1785. 2d. For that the report contains no directions that these notes should be delivered up; and as Defendant cannot apply to a Court of Chancery, as he might in *England*, for an injunction, they may still be circulated, and in the hands of a *bona fide* indorsee, so that the Defendant may be compelled to pay the money over again; consequently the report is neither *mutual*, nor *final*, *Cro. J.* 315. *Cro. C.* 112. 1 *B. M.* 304. 2 *B. M.* 1224. *Doug.* 362. 5 *Bac.* 289. 313.

3d. The reports of referrees under the act of Assembly are acknowledged to be different from awards at common law; but in fact there is little difference between them and verdicts. If, therefore, these actions had been tried by a jury, and a verdict given similar to this report, no judgment could be given on it. *Co. Litt.* 227. *Hob.* 49. *Stra.* 1024. For on what action can the Court award execution, or how can they apportion the sums?

Wilson, *Sergeant* and *Sitgreaves*, for the Plaintiff, were desired by the Court to confine themselves to the *last* objection, as the *first* was not supported by testimony; and with respect to the *second*, it would overset too many reports, were the objections of want of mutuality and not being final, upon such grounds, to defeat the report.

Taking up, therefore, the third objection, they argued that the referrees not being charged with partiality or misconduct, the objections to the form of the report, must find a cold reception with the Court. If judgment cannot be entered upon the record as it stands, the Court may interrogate the referrees and divide the sum; or they may allow the Plaintiff to sue out execution in one action, and release the others, or by their own authority, the Court may interpose, and consolidate the actions. 1 *Stra.* 420. But, in fact, it was contended, that the actions were already consolidated by the consent of the parties in the filed agreement; which is surely as much a part of the record, as a verdict, or a report; and by the submission of all matters in variance, the cause of action in each of the actions, is submitted in every one of them. *Hob.* 54. 12 *M.* 234. *Stra.* 514. 3 *Bac. Abr.* 288.

Ingersol in reply. Awards at common law differ so widely from reports under our act of Assembly, that scarce any authority upon the subject of the first, is applicable to the second. In the first case, terms may be imposed before the Court will grant attachments; but here the report is equivalent to a verdict, and the sole point now, is, whether, if it were truly a verdict, judgment could be entered upon it. It was not discovered 'till late in the argument that the parties themselves had consolidated the actions; but upon the examination of the agreement nothing will appear that shews that intention, or produces that effect. It enumerates all the four actions, says that rules (in the plural) shall be entered in *these several actions*; and then there is a fifth action entered in this very agreement, which it it subsequently and separately agreed to refer. At least, therefore, this last action is not consolidated.

To discontinue, or release four, and sign judgment upon the fifth, would be impossible, because the report expressly comprises more than the fifth action was brought for. And to call upon the referrees, and by their assistance divide the sum, would be an illegal stretch of power, which was not to be apprehended from the Court. Nor, as to the point of consolidation, has the Court authority to do more than grant imparlances in some of the actions, to induce the party to consent that the trial of one shall decide the rest, which would be no relief in the present case. 1785.

On the 15th of *November* the PRESIDENT delivered the opinion of the Court as follows:

SHIPPEN, PRESIDENT. The justice and fairness of the transaction, on the part of the Plaintiff, is so obvious; and the consent of the parties to consolidate the actions, is so naturally implied from the whole of the proceedings, that my brethren* think the report ought to be confirmed.

For myself, I doubt the legality of it, because I do not see how it is possible to enter judgment upon the report so as to avoid error. The consolidation of actions is intended to save expence, and might have been ordered by the Court on motion; but this agreement of the parties does not appear to me to amount to a consolidation, there being five several rules of reference in the five several actions; and though, indeed, the referrees have undertaken to consolidate them, I much doubt their authority so to do. Instead of finding a gross sum due on all the notes, they might have found what was due on each note, and have reported the several sums on the separate rules of reference. However as my brethren think the report ought to stand, let it be confirmed, and the Plaintiff may make up the record as he thinks safest.

Report confirmed.

MORRIS *v.* TARIN.

A Case was made in this cause for the opinion of the Court, stating, that the Defendant bought a bill of exchange drawn by *Benjamin Harrison & Co.* upon a house in *France*, which was presented to the drawee in *February* 1784, and protested for *non acceptance*. Before it was presented, however, the drawee had become insolvent, and an arrêt was issued by the *French* government, prohibiting the institution of suits against him for a certain time. When the bill became due (the arrêt still continuing in force) it was again presented, and, on the 5th of *June* 1784, protested for *non payment*. Without any knowledge of the second protest, and without any suit or compulsion of law, the Plaintiff, who was one of the partners of the company that drew the bill, repaid the Defendant the principal, interest and charges, *with* 20 *per cent. damages:* But, afterwards, conceiving that he had paid the 20 per cent damages in his own wrong, he brought this action to recover back the amount.

* *Fleeson* and *William Rush*, Justices.

1785. *Sergeant*, for the Defendant, contended generally, that, an action lay against the drawer of a bill of exchange upon a protest for non-acceptance only. *Cun. B. of E.* 77. 83. 85. *Bull. N. P.* 269. *Doug.* 55. But that, at any rate, after a voluntary and deliberate payment, the Plaintiff in an action for money had and received, ought not to recover what the Defendant might fairly accept.

Wilson, for the Plaintiff, denied that the cases from *Cunningham* were in point; disputed the authority of the case in *Buller*; and asserted that the decision in *Douglas*, being posterior to the revolution, was not law here. He contended that the contract of the drawer was not that his bill should be accepted, but that it should be paid; that there was no breach 'till after the day of payment; that the protest must then be made, or, at least, within the day of grace, to entitle the holder to recover from the drawer. *L. Raym.* 743. and that the act of 12 *W.* 3. *c.* 70. which gives the holder 20 *per cent*, damages, mentions only bills returned unpaid, and not unaccepted. He urged strongly that the readiness of the Plaintiff in taking up his bills, should operate in favour of the present action, which required only an equitable right to maintain it, and which it would, therefore, be incongruous to say was more favourable for him, who put his creditor to to the vexation and delay of a law suit, than to the man of honour and integrity, who, in his eagerness to do justice, had erroneously paid more than he was bound to pay. And, he added, that the 20 *per cent*. damages, was imposed as a penalty, and no consideration paid for it by the purchaser of a bill, who therefore had no right in conscience to retain it.

The Court held the case under advisement till the 21*st* of *November*, when THE PRESIDENT delivered their opinon as follows:

SHIPPEN, *President*.—This is an action for money had and received to the Plaintiff's use. The facts are, that a bill of exchange was drawn on a house in *France* by *Benjamin Harrison & Company*, of which company the Plaintiff was one, in favour of the Defendant, or some other person who indorsed the bill to the Defendant. The bill being presented to the drawee, he refused to accept it, and a protest was made for non-acceptance—The bill with the protest was sent back, and the Plaintiff being applied to for payment, voluntarily paid the Defendan both principal and damages. This action is brought on an implied *assumpsit* to recover back part of the money, to wit, the damages, as paid by mistake; the Plaintiff contending, that to compel him to the payment of damages, there ought not only to have been a protest for *non acceptance*, but likewise a protest for *non-payment*; and that having paid those damages, when by law he was not obliged to pay them, he ought in justice to recover the money back.

This is a liberal kind of action, and will lie in all cases where by the ties of natural justice and equity the Defendant ought to refund the money paid to him; but where the party might with a good conscience receive the money, and there was no deceit or

unfair practice in obtaining it, although it was money which the party could not recover by law, this action has never been so far extended as to enable the party who paid the money voluntarily, to recover it back again. The case of *Lowrey* v. *Bourdieu* in *Doug.* 452, and that of *Farmer* v. *Arundel* in 2 *Black. R.* 825, are full to this point. 1785.

In the present case the Defendant had presented the bill to the drawee for acceptance, and on refusal got it protested. Shortly after, and before the day of payment, an arret from the King of *France* prohibits the creditors of the drawee from suing him; upon which the bill was immediately sent back, and Mr. *Morris*, without waiting for a protest for non-payment, voluntarily takes up the bill and pays the damages. A protest for *non-payment*, however, appears to have been made in *France* before the money was paid by Mr. *Morris*, although he did not know it. The Defendant has acted with fairness, and lain out of his money, and might with a good conscience receive the legal damages.

The point of law principally agitated in this cause, whether a protest for non acceptance only, is sufficient to recover the money from the drawer, is not material to be determined in this action, because, as it is voluntarily paid, and the Defendant might consistent with justice receive it, whether that point of law is for, or against the Plaintiff, we think he cannot recover the money back.*

Judgment for the Defendant.

HENDERSON *v.* ALLEN.

A Judgment had been entered at the settlement of the docket, and the Defendant was taken in execution on a *Ca. Sa.* returnable to *December* Term 1785. He now applied for the benefit of the insolvent acts, although he was not taken in execution till the 26th of *September*, and his petition was presented subsequent to the application made by the debtors, on the third day of the term.

The Court said that the practice under the act for the relief of insolvent debtors, was, that only those should be discharged, who made their application within the three first days of the term; for, otherwise, the Court might be continually employed on this business, to the delay and detriment of every other.

The *Prothonotary* mentioned, on this occasion, that it was the constant practice to enquire, whether the writ of execution was returnable to the term, at which the Defendant applied for his discharge.

The petition was dismissed.

Bankson for the Plaintiff—*Rawle* for the Defendant.

* See 2 *Dall. Rep.*

Oyer and Terminer, &c.

AT PHILADELPHIA.

September Sessions, 1785.

RESPUBLICA *v.* CALDWELL.

THIS was an indictment for a *nuisance*, in erecting a wharf on the public property. The Defendant offered witnesses to prove that the erection of the wharf has been beneficial to the public, and, therefore, not to be regarded as a nuisance.

But M'KEAN, *Chief Justice*, delivered the opinion of the Court, that the evidence was inadmissible, for two reasons: *First*, Because it would only amount to matter of opinion, whereas it is on facts the Court must proceed; and the necessary facts are already in proof. *Secondly;* Because it would be no justification; for, on the same principle that the Defendant might carry his wharf 12 feet, he could justify extending it farther; or any other man might excuse a similar intrusion. Suppose, for instance, a street were 60 feet wide, 12 feet might be taken off it, without doing any material injury to the public property, or creating any great obstruction to passengers; yet, surely this will not justify any man's actually building upon, and assuming the property of the 12 feet that could be thus spared.

Common Pleas,

PHILADELPHIA COUNTY.

December Term, 1785.

HOLLINGSWORTH *v.* HAMELIN.

THE Defendant having absconded, a domestic attachment issued against him at the suit of the Plaintiff, and the auditors, under that process, having advertised that all persons, who had demands, should send in their accounts, in a reasonable time afterwards, made a dividend among the creditors that filed their claims. Previously to issuing the domestic attachment, the Defendant was indebted to the *Commonwealth* for duties upon a cargo imported, and having given bond to *Sharp Delany* (who was the collector, but not so named in the bond,) a writ was thereupon issued against him, but was returned *non est inventus*. Of this, however, the auditors had no notice, till the dividend above mentioned was paid. *Delany* now claimed full payment. The matter was referred to the opinion of the Court upon a case stated, which was argued, at an adjourned Court, on the 11th of *February* 1785, by the *Attorney General* for the *Commonwealth*; *Cox*, *Ingersol* and *Sergeant* for the creditors.

The COURT unanimously decided, that, on these facts, the *Commonwealth* was entitled to no preference.

1785.

LAZARUS BARNET's CASE.

LAZARUS BARNET having absconded, several *foreign attachments* were issued against him; and, afterwards, motions were made to set them aside respectively, in favour of a *domestic attachment*, which had, likewise issued against him. These motions were all founded upon the following affidavit. "*Daniel Benezet* maketh oath that on or about *the 12th day of May* 1783, the deponent let his house in Second Street, *Philadelphia*, to a certain *Lazarus Barnet*; that the said *Lazarus Barnet* has resided therein and followed the business of a Merchant or Store-keeper from that time *'till about two weeks ago*, when the said *Lazarus* absconded from the city, or secreted himself therein, as this deponent is informed. And this deponent further saith, that the said *Lazarus Barnet* appeared to him to be a married man, and having a family and servants in his house." Sworn the 11th of *December*, 1784.

This case was argued on the 20th of *January* by *Sergeant* and *Levy* against the foreign attachments; and *Wilson* and *Ingersol* in support of them. On the 27th of the same month, THE PRESIDENT delivered the unanimous opinion of the Court.

SHIPPEN, *President*.—The question before us, is, whether the *foreign* attachments, or the *domestic* attachment, issued against *Lazarus Barnet*, shall be established? The arguments in support of the foreign attachments, are chiefly founded on the third clause in the first act of Assembly, which says that "no writ of attachment shall be granted against any person's effects, but such only as, *at the time of granting such writs*, are not resident, or residing, within this province; and on that of the second act, which leaves non-residents to be proceeded against by foreign attachments, agreeably to the directions of the first act. And it is urged, that, in the present case, it does not appear, that *Lazarus Barnet* was resident or residing within the state at the time of granting the domestic attachment, and, if he was not so resident, he is the object of the foreign attachment law.

Our opinion on this case, must be founded upon a connected view of the several acts of Assembly relating to attachments; and these, are the 4 *Ann. c.* 28. the 9 *Geo.* 1. *c.* 3. and the 14 *Geo.* 3. *c.* 5.

The object in passing the *first* act, was to subject the effects of absent debtors to the payment of their debts; as it appears by the preamble, that before that time, they were not equally liable with the effects of those persons who resided on the spot. Within the provisions of that act, three sorts of debtors were included:—1st. Those who never resided here, or whose actual residence was abroad. 2d. Those who had resided here, and had absconded, or otherwise removed; both of which are comprised in the general description of *non-residents* in the third clause of the act;

and 3d. Those who were still here, but were about to remove without giving security to their creditors. In the *second* act it is stated, "that divers irregularities and fraudulent practices had "happened, to the injury of such creditors as were willing to "accept an equal share of the effects of their debtors;" and from these general expressions we are left to consider, to which of the foregoing descriptions of debtors the preamble refers. It could not be the first; they residing abroad, and their effects coming here only occasionally, there was no great danger of fraudulent practices; and so it appears by the subsequent law still continuing the same remedy against them. With respect, however, to the other two classes, it was possible for a creditor to seduce his debtor to leave the province, or to entrap him into the commission of some other act, which brought him within the construction of the law, and to seize upon all his effects. The act, therefore, makes an entire new provision, with respect to both the latter descriptions of persons, and consolidates the two cases. It mentions nothing of persons absenting themselves *out of the province*, nor of persons refusing to give security; but enacts, generally, that all persons who had *absconded* from their usual place of abode for six days, with design to defraud their creditors, and not distinguishing whether *in* the province, or *out* of the province; *if* they *absconded* with that design, they were persons whose effects the Legislature intended should be divided among their creditors. To say that they must be still remaining *in the province*, would be needlessly restraining the generality of the words of the act, which suggests that sometimes they may have left the province, by the words, "and had not *left* a clear estate in fee "simple *within the province*, sufficient to pay their debts." 1785.

The last clause of the second act provides, that "nothing in this "act shall be construed to exempt the goods or effects of any per-"son or persons, *not inhabitants* of this province, from being attach-"ed according to the directions of the former act." Here appears a designed variation from the expression used in the first act: it does not say persons not residing in the province *at the time of issuing the attachment*, but, generally, persons *not inhabitants of the province*, and seems expressly meant to take in only those persons first described in the former act, persons who never resided here, or whose actual residence was in another country. A contrary construction would defeat the general intention of the Legislature, as in most cases those debtors who escape from their creditors, go out of the state. Nor is it material as to the policy of the act, whether he remains *in* the state, or goes *out* of it; he has committed an act similar to an act of bankruptcy, by absconding with a fraudulent design; and in that case, and in that only, is he the object of the second act.

The word "inhabitant" has a plain meaning. A person coming hither occasionally, as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to *Boston*, or any other place, cease to be an inhabitant. But a man who comes

1785. from another place to reside among us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away with design to defraud his creditors, he ought surely to be considered such an inhabitant as not to be an object of the foreign attachment, but of the domestic one, and as a person whose effects should be seized for the benefit of all his creditors, and not of the first creditor who shall take out a foreign attachment, otherwise there would be few objects for this equitable law to operate upon.

Such has been the uniform construction of the law of attachments in *Pennsylvania* from the year 1724, to the passing of the act of the 24 *Geo.* 3. *c.* 5, which last act gives a legislative sanction to the preceding practice.

We have, therefore, no hesitation in declaring our unanimous opinion, that the foreign attachments against *Lazarus Barnet* be dissolved.

The *foreign* attachments dissolved.

CASE *v.* HUFTY.

IN this case it was ruled by THE COURT, that, to entitle the Plaintiff to judgment by default, the service of a summons *on the person* of the Defendant, as well as if left at his house, must be *ten days* before the return.

VIENNE *v.* M'CARTY, surviving Partner.

AFTER argument, THE PRESIDENT delivered the opinion of the Court in this cause.

SHIPPEN, *President*:—The first point to be considered in this case, is, whether the Court think themselves authorized to enquire into the cause of action in the case of *Attachments*, as they do in cases of *Capias*, where the Defendant's person is taken into custody? The reason of enquiring into the cause of action on writs issued against the person, is to prevent a vexatious Plaintiff from imprisoning the body of the Defendant *without cause*. In the case of attachments, though the reason may not perhaps be so forcible, as the personal liberty of the Defendant is more precious than his property, yet the abuse of the process of law may be as great, and the necessity of providing against a wanton and groundless seizure of the Defendant's effects, as obvious. In the case of *specific articles* attached, a stranger's ship, or other effects, may be taken out of his hands, and detained for such a length of time as to ruin his voyage, and embarrass his affairs beyond redress. So, in the case of *debts* attached, his property may be locked up, his remittances prevented, and the injury nearly as great as in the other case. The bail marked by an attorney,

or a malicious Plaintiff, may be out of all bounds disproportioned to the debt; and if there was no way of examining into the justice or extent of the demand, a Defendant might be at the mercy of the Plaintiff, to be ruined at his pleasure. All these mischiefs may be prevented without injury to any one, by an enquiry made by the Court into the cause of action, in the same manner that it is every day done in cases of *Capias;* and we think the spirit of the law, and sound reason, point out the necessity of such an interposition. 1785.

The cause of action shewn in this case, is a bill of exchange drawn by *James Cummins*, with a protest for non-payment, and this would undoubtedly be a sufficient cause of action against *James Cummins*, his executors, or administrators; but to make it amount to a cause of action against *William M'Carty*, the surviving partner of *James Cummins*, it being the separate debt of *James Cummins*, contracted before the partnership, something more must be shewn—All that is shewn is, that he has a sum of money in his hands, recovered in two actions, one against *John Nixon* as administrator of *James Cummins*, the other against *Mifflin* and *Butler*, both sums recovered by *M'Carty* as surviving partner of *Cummins*. This is an action at common law, and I am at a loss to find out upon what principle it can be supported. I have heard of no case which gives a creditor an action against the debtor of his debtor;—there is no privity between the parties. An attachment will lie against the debtor himself, and that attachment may be laid in the hands of a third person as garnishee; but to bring the action originally against that third person, is, I believe, without example, unless some particular lien appears on the goods or money in his hands; and no lien appears in favour of this creditor which does not exist in favour of every other private creditor of *Cummins*. Besides, there appears to have been a verdict of a Jury, and a judgment of a Court of Law, upon the very point on which the Plaintiff founds his demand. If the administrator of *Cummins* could not retain this money against the surviving partner (the administrator being the proper representative of all the creditors) how can a single creditor maintain an action for that very money?

We are therefore of opinion, that no sufficient cause of action appears against the Defendant, and adjudge that the money and effects of the Defendant be discharged from the attachment.*

* This case was brought before the Court upon a doubt entertained by Mr. *President* SHIPPEN, of the power of a single Judge to afford a remedy in the case of attachments, similar to that usually given in cases of arrests—In the latter case, the cause is still continued in Court by ordering a common appearance; but in attachments the Defendant being absent, cannot enter a common appearance, or give a warrant of attorney for that purpose: Therefore all that can be done, where no cause of action can be shewn, is to dissolve the attachment, which it is only in the power of the Court from whence the writ issues, to do.

1785.

WEAVER v. LAWRENCE.

REPLEVIN—The Defendant pleaded property and gave bond; upon which *Levy* for the Plaintiff, moved for a writ *de proprietate probanda;* and after argument, on a rule to shew cause why it should not issue, the PRESIDENT delivered the opinion of the Court as follows.

SHIPPEN, *President.*—In *England* there are two kinds of replevin; *First*, by *Common Law*, when the writ issues out of the Court of Chancery: *Secondly*, by the statute of *Marlbridge*, which enables the sheriff to make replevins without writ, and then, having taken security, he proceeds on the complaint of the Plaintiff, either by parol, or precept to his bailiff. In the latter case, the writ *de proprietate probanda*, issues at once upon claim of property; and, being tried by an inquest, if it is found for the Plaintiff, the sheriff goes on to make the replevin; but, if for the Defendant, he forbears. This summary proceeding, with regard to the writ *de proprietate probanda*, is confined, however, to the case of a plaint in the sheriff's court, under the statute; for, when replevins are at common law, no writ *de proprietate probanda* issues till after the return of the sheriff on a *pluries* replevin; the *original writ*, or the *alias*, being only directory to the sheriff to make replevin, and proceed in the county court, and are not returnable process, as the *pluries* is by having in it the clause of "*vel nobis causam significes.*" If, therefore, the *pluries* is returned into the *Kings-Bench*, or *Common-Pleas*, with a claim of property by the Defendant, a judicial writ *de proprietate probanda* may issue returnable into either of those courts. But on this writ, if the sheriff's inquest find property in the Defendant, the Plaintiff is not concluded, being only an *inquest of office;* and he may either bring a new replevin, or an action of trespass against the sheriff, in which the question of property shall be finally tried. But when the parties have *appeared* in bank, and the Defendant claims *property on plea*, no writ *de proprietate probanda* can issue at all, but the claim must be tried in court.

Having thus stated the law in *England*, we must now enquire on what footing replevins are in *Pennsylvania*, and under what law they issue?

It is clear, that in this state there can be no replevin *under the statute of Marlbridge*, since there is here no *such county court to enter plaint* as in *England*, nor any sheriff empowered by his own authority to make replevin; and, consequently, there can be no *summary proceeding*, as to the writ *de proprietate probanda*. With respect to writs of replevin at *Common Law*, these, likewise, cannot be issued in *Pennsylvania*, for want of a Court of Chancery, from which they might issue as an *original writ*. Hence it was necessary to make a law for ourselves, and this was accordingly done, in the year 1705, by an act Assembly, which directs,

that " it shall be lawful for the justices of each county, to grant 1785.
" writs of replevin in all cases whatsoever, where replevins may
" be granted by the laws of *England*, taking security as the said
" law directs, and make them returnable to the respective Courts
" of *Common Pleas*. in the proper county, *there* to be determin-
" ed according to law." 1 *State Laws*, 43.

This act seems then to have made a very considerable alteration in the proceedings in replevin: for, 1st. It does not recognize two kinds of replevin, one by plaint, and the other by writ; 2dly. Replevins are made always returnable writs, and the parties appearance required on the return; and 3dly. They are directed to be *there* determined, that is, in the Court of *Common Pleas*.—As the *proceedings* are different, so has been the *practice* under the law; and in writs of replevin here (as in other cases) a *summons* to the Defendant to appear, is always inserted, and a precise day given for his appearance. Nor is the writ liable to be defeated by a claim of property, as it is in *England;* where that claim, as I have already observed, puts an end to the suit *on the replevin*, so that, if it is afterwards revived, it must be by the writ *de proprietate probanda*. But in *Pennsylvania*, the practice on a claim of property has been agreeable to the act of Assembly; the suit goes on, and, although the claim prevents the delivery of the goods to the Plaintiff in replevin, yet, the Defendant gives security to deliver them, if, on trial, the property shall not be found in him. This practice, therefore, clearly supposes that the trial of property was intended, by the act of Assembly, to be in the Court of *Common Pleas*, and not elsewhere.

No writs *de proprietate probanda* have hitherto issued in this state. The *summary writ* under the statute of *Marlbridge*, seems indeed to be the only one, which can, in most cases, be of real use, by the *immediate* intervention of an inquest to decide the claim of property; but, for the reasons before assigned, that cannot issue here. The *judicial writ* too, if it could issue agreeably to our act of Assembly, would rather occasion delay, than expedite the cause, and could in very few instances answer the ends expected from it. For, *first*, it cannot issue *till after the return of the pluries writ of replevin*, when the time would, perhaps, be elapsed, in which it would be of most importance to determine the question of property: and *secondly*, if it should issue and be executed, it would not be *final*, in case the property should by found for the Defendant, being only an inquest of office, and the Plaintiff still entitled to a new replevin, or an action of trespass against the sheriff.

In *England* most cases of replevin are founded on previous distresses for rent; and it is even said in some books, that it lies in no other. But here it issues wherever a Plaintiff claims goods in the possession of another; and accordingly, things of great value, as *ships*, are frequently replevied. If, therefore, a hasty change of possession should take place by a sheriff's inquest, it might be attended with great mischiefs; and vessels loaded, and ready to sail, might be ordered out of the possession of those who have long held them although able and willing to give security to the value.

1785. On the whole, after the present practice on replevins has been of so many years standing, and seems founded on a law of our own, we think it would be improper to make such an alteration, as would be occasioned by issuing judicial writs *de proprietate probanda*.

The rule discharged.

TAYLOR *v.* KNOX, *et al.*

FINLAYSON *v.* KNOX, *et al.*

FOREIGN attachments.—In these cases rules had been obtained to shew cause of action, and why the attachments should not be quashed.

On the argument, the garnishee *Henderson* (who was also a co-partner with the Defendants) produced several witnesses, by whose testimony the following facts were established:—That *David Knox* came to *Philadelphia* in the spring of 1784; that he brought furniture with him, hired a dwelling house and store, and professed an intention "to lay his bones here." That he went to *Virginia* in *February* 1785, and sailed thence to *England*, in consequence of receiving intelligence of some misconduct of another partner, named *Cowan*, who resided there, and had never been in *America*. That during his absence, and at the time of laying the attachments, the co-partner, now garnishee, continued in possession of the house in *Philadelphia*, with much the same establishment of servants, &c. but after the attachments were laid, he broke up house-keeping. That *David Knox* was a single man, and it was not known, whether he had taken the oath of allegiance to this state, or not.

The Plaintiffs to shew their cause of action, produced affidavits of accounts from their respective books, sworn to before the *Lord Mayor* of *London*.

The question being argued by *Ingersol* and *Rawle*, in support of the motion, and by *Lewis* and *Wilcocks* against it, THE PRESIDENT, at an adjourned sitting on the 15th of *February* 1786, delivered the opinion of the Court.

SHIPPEN, *President*.—The *first* point to be decided, is whether the foreign attachments ought not to be dissolved, on the proofs given of *Knox*'s being an *inhabitant* of *Pennsylvania*, at the time they issued?

We would avoid laying down any general rules as to what will or will not, make a person an *inhabitant* within the attachment law, lest cases should hereafter happen, which might come within those general rules, but were not in the contemplation of the Court in the particular case before them. We think, however, if any general rule was made, it would be reasonable, and very consonant to our laws and constitution, that the person's resi-

dence here, to make him an *inhabitant*, should be so long as to give him the *rights* of citizenship—to wit, for twelve months. And we should have no hesitation in laying this down as a rule, if it were not for those cases of dispute which may arise between creditors on a *domestic* attachment, and creditors on *foreign* attachments, where it may frequently happen that the debtor's residence may be less than 12 months, and yet he may, and ought, to be an object of the domestic attachment law, so as to have his effects divided among all his creditors, and not swept away by the first creditor who takes out a foreign attachment.* But in cases where a stranger comes among us, and remains here for a short time, and then goes away under such circumstances, as *not* to make him an object of the *domestic* attachment, it will always have considerable weight with us, that he has not resided here for twelve months. 1785.

In *Knox*'s case his residence here was only eight or nine months; the family he left behind him, does not appear to be of a kind to denote an unequivocal continuation of his residence, being probably no more than was sufficient for his partner *Henderson*'s own accommodation as a single man.

The *second* question is, whether there has been such proof of a debt due, as is sufficient to shew a cause of action?

And here it will be proper to mention the reason and occasion of making the rules with regard to proofs necessary for holding to bail on writs of *capias*. When I came into this Court, I found a practice had lately taken place of requiring proofs of the debt, similar to those required by the statute of 12 *G.* 1. so as to disable absent Plaintiffs from holding Defendants to bail, for want of a positive affidavit before one of the Judges of this Court of a subsisting debt. I considered this practice as not founded in law, and as tending to injure the credit of the country. That it was not founded in law I took to be clear, from the words of our act of Assembly, made shortly after the revolution, extending only such of the statute laws of *England* as had *theretofore* been in force in *Pennsylvania*. The act of 12 *G.* 1. was certainly not in force, nor ever practised under, before the revolution. But as the judges who had sat here before me, thought there was good reason to keep up a kind of reciprocity between *England* and us, upon this subject, and not being willing to relax the rule totally, it became necessary in order to preserve an uniformity of determination in the several judges of the Court, to settle another mode, so as to avoid extending an act of Parliament by their authority, which had not been extended by the Legislature, and yet not to give the inhabitants of that country the same easy method of proving their debts in *England* before the *Lord Mayor*, or other magistrate there, which had been practised previous to the revolution under their own acts of Parliament. A middle way was, therefore, struck out; and a signature of the party to some instrument of writing, or some letter, or ac-

* See ant. 152, *Lazarus Barnet*'s case.

1785. knowledgment of the debt, was made necessary to be superadded to the usual probate made before the war. This rule, however, affects the inhabitants of other countries as well as *England*; and it may possibly be found necessary, at some future time, to make an alteration in it more conformable to the general law on those subjects.

But, as at the time of making the rule, we had no eye to any other kind of process, than writs of *capias*, and it was expressly confined to them, in favour of *personal liberty*, we do not think it should be extended to other cases not then within our view. In cases of attachments, therefore, we think it safest to follow the law as we find it in our books before the statute of 12 *G.* 1. And as it appears by the case in 8 *Mod.* 323, that an affidavit of a Plaintiff, before a notary public in *Holland*, was deemed sufficient to hold the Defendant to bail, we think the like affidavit in this case, should be sufficient for the same purpose.

Motion to dissolve the attachments discharged.

Common Pleas,

PHILADELPHIA COUNTY,

March Term, 1786.

HOLLINGSWORTH *v.* LEIPER.

A RULE had been obtained to shew cause, why the report of referrees should not be set aside, on the ground of their having heard a witness interested in the event of the suit; and, after argument, THE PRESIDENT pronounced the decision of the Court.

SHIPPEN, *President*.—The determination of causes by referrees under a rule of Court, has become so frequent and useful a practice, and is attended with so many advantages towards the summary administration of justice, that it would be extremely mischievous to shake their reports by captious objections, where the substantial rules of justice are not violated. The merits of the cause are solely submitted to them, as judges of the parties own choosing, and are not afterwards enquired into by the Court, unless there should appear a plain mistake of the law or fact.

1786.

As to the forms of their proceeding, both parties should have an opportunity of being heard, and that in the presence of each other, that they may be enabled to apply their testimony to the allegations. The witnesses, on both sides, are likewise, to give their evidence in the presence of the parties, that they may have an opportunity of cross examining them. No surprise is permitted, such as refusing the parties a reasonable time to bring forward their witnesses, or refusing to hear them when they are brought. These rules, or similar ones, are founded in natural justice, and are absolutely necessary for the due administration of justice in every form whatever.

As to the kind of evidence which the referrees may hear, there always has been, and must necessarily be, in this kind of tribunal, a very great latitude. The parties, generally unassisted by Council, are permitted to relate their own stories, and confront each other; their witnesses are heard even without an oath, unless the contrary is stipulated, or the referrees require it. Books and papers are inspected and examined by them, without regard to their being such as would be strictly evidence in a court of law. And this practice being known to both parties before they agree to the reference, and the advantages arising from it, being mutual, there seems no just reason to complain of it.

In public trials in courts of law, the judges sit to superintend the evidence, and no interested witnesses are, in general, permitted to give evidence to the jury; but referrees occupy the office both of judge and jurymen; their discretion, therefore, must necessarily be much relied on, and as they are generally unacquainted with the artificial rules of law, they must be guided principally by their own reason. If we were once to set aside a report, because the referrees had heard an interested witness, we should open a door for such a variety of objections, that scarcely a single report would stand the test. Papers not formally or legally proved, or hearsay evidence admitted, would be as fatal to reports, as the admission of interested witnesses, being equal violations of the rules of evidence.

Rule discharged.

OGDEN *v.* ASH.

THIS was an action upon a policy of insurance on the ship *Brothers*, which came before the Court upon a case stated wherein the single question was, whether a warrant inserted in the policy, had been complied with on the part of the insured, or not? After argument, THE PRESIDENT stated the point, and delivered the opinion of the Court.

SHIPPEN, *President*.—The policy in this case, is on the outward bound voyage, wherein it is warranted "*that orders will be given*

"*that the ship shall not cruise.*" Whether such orders have, or have not, been given, is the question before the Court. 1786.

The orders *which were* given, are produced. They consist of instructions which, in the former part, relate to the outward bound voyage, and, in the latter, to an intended cruise for two or three months, after the outward bound voyage, which was the sole object of the insurance, should be completed.

The instructions with regard to the outward bound voyage, begin with an account of the cargo, to whom it is consigned, and give the usual directions in mercantile voyages, how it is to be disposed of, and how the proceeds shall be applied. The captain is expressly directed not to touch at any port to the southward of *Philadelphia*, *lest the insurance should be endangered*, but no mention is made of *a cruise*, except that the goods are to be sold for the purpose of fitting her out afterwards *for a cruise*.

It is, however contended, that sufficient appears on the face of the instructions, considering the unwarlike condition of the vessel, and the intent of the voyage, to shew, that, though no express direction is given *not to cruise*, yet such an implied direction *is* given, as will satisfy the words of the warranty.

The general intention of the owners, to be collected from the instructions, is sufficiently clear, that they did not mean to give the captain a *power to cruise*. But what was the intention of the parties in making the *warranty?* Was it, that such orders should be given as by construction or inference, should shew *that* to be the intention of the owners? or, was it not, that the captain should be directed in express terms *not to cruise?*

If the warranty had been that *no orders should be given to cruise*, or *that he should not be impowered by his orders to cruise*, these instructions would certainly have been a compliance with the warranty; but the warranty is not *negative*, that he should *not* have orders to cruise, but *positive* that he should *have orders not to cruise*. And in which ever way the warranty had been expressed, if the captain *had cruised*, and the vessel by that means had been lost, *he* would have been answerable—So that the responsibility of the captain, is not any rule to govern the construction of the *policy*, because if he had cruised *without orders*, he would have been equally liable, as if he had cruised *contrary to express orders*. The underwriters have stipulated that *more* should be done, than would barely make the captain answerable for cruising. What their reasons were, we can only conjecture; it might be supposed, that if the orders were silent as to his cruising, he might be tempted, by an apparent prospect of gain, to do that, which he would not dare to do in the face of express orders. It is well known, that there have been many captains who have not scrupled to break orders which were plain and express; but there are many more, who, when their orders are loose or silent, or discretionary, have run the risk of violating the spirit of them, and relied upon the generality or silence of their orders, to justify them to their owners.

1786. In the present case, the condition of the vessel did not preclude the possibility of cruising. She mounted 16 guns, she had leave, by the terms of the policy, to call at *Beaufort for men*, she was intended to be a cruising vessel after the outward bound voyage was completed, and it might not be an unreasonable suspicion in the underwriters, that the captain, unless expressly restrained, might be tempted to cruise in the outward bound voyage. Whatever their reasons were, the underwriters had certainly a right to make it a part of their contract; without it, they might have refused to insure at all, or they would perhaps have demanded a higher premium; ard therefore being stipulated, the owners should have complied with it.

These warranties in policies of insurance are required by law, and by the constant usage of merchants to be strictly complied with; they are generally expressed in a few words, but where they are plain and clear, it would be of dangerous consequence to this useful branch of mercantile business, to introduce a loose construction of them.

We are of opinion, upon the case stated, and a view of the policy and orders, that the warranty has not been complied with, and that judgment should be given for the Defendant.

Judgment for the Defendant.

MARRIOT *et ux.* *v.* DAVEY *et al.* Executors.

THIS was an action brought by a residuary legatee under the act of the 12 *Geo.* 3. *c.* 16. 1 *St. L.* 449. to which the Defendant pleaded *fully administered.* The Plaintiff thereupon moved for the appointment of auditors; but the Defendant objected, because his accounts had already been left by consent to referrees, on a former citation before the register of wills, &c.

THE COURT, however, determined, that the former settlement was not conclusive; and that, by the words of the act, it was intended, new auditors should be appointed, *ex tempore*, upon the plea of want of assets.

Rawle, for the Plaintiff, *Sergeant*, for the Defendant.

STOTESBURY *v.* COVENHOVEN.

ON an affidavit that the Defendant was in confinement, and that material witnesses in his favour were about to leave the state, THE COURT granted a rule to take their depositions, although the writ was not returnable 'till the next term.

SOMERS *v.* BALABREGA.

IT was ruled in this case, that an Attorney's agreement to refer, binds his Client.

Supreme Court of Pennsylvania:

April Term, 1786.

SLIVER, Plaintiff in Err. *v.* SHELBACK.

THIS was a question on a *writ of error*, brought to reverse a judgment in the *Common Pleas* of *Philadelphia* county, against the Plaintiff in error, when within age. The record of the Court below, stated, that the Defendant (now Plaintiff) appeared in person, imparled to the next term, and then appeared and said nothing; wherefore, &c. The plaintiff attained his full age before he brought the writ of error.

Levy, for the Plaintiff in error, cited 8 *Mod.* 185. *Rep. temp. Hardw.* 104. 376. 1 *Bl. Com.* 465. *Cro. El.* 569. 818. *Lill. Ent.* 252. 3 *Bac. Abr.* 149. But, as his arguments were afterwards admitted, and repeated by the Court, it is unnecessary to insert them here.

Lewis, for the Defendant in error. Infancy must be tried by inspection, 3 *Bl. Com.* 331. By the record it is stated, that the Plaintiff in error appeared twice; and the Court might then have tried the question of infancy by inspection, if he had suggested it; so that he is not at this time entitled to be relieved, 3 *Bac. Abr.* 124. 134. 3 *Bl. Com.* 331. In all judicial process, the error must be reversed before 21 years are attained for what is done in Court, though not for what is done *in pais*; as in the latter case, a different mode for the trial of infancy is adopted, to wit,

1786. an inquest. 3 *Bac. Abr.* 134. 5. 6. and that may be done either within, or at full age. 9 *Vin.* 377. *Co. Litt.* 280.

By M'KEAN, *Chief Justice.*—*Nil dicit* is not a judicial act; but *cognovit actionem* would have been so.

Lewis. True; but the giving judgment upon *Nil dicit* is a judicial act; and when he says nothing, there is the greater reason for the inspection of his age, in order to protect him, who evidently knows not how to protect himself. But how can the Court ascertain the truth of what is alleged? Not by the verdict of a Jury, for this is a judicial act; nor by the inspection of the party, for he has now attained his full age; it can only be done by the record.

Lewis admitted, however, upon a question being put to him, that by the *rejoinder* in error, the infancy, which was assigned for error, was acknowledged; but he relied upon the impossibility of obtaining relief for a judicial act done *diens ætatem*, by a writ of error *post plenam ætatem.*

The CHIEF JUSTICE delivered the opinion of the Court, in substance as follows:

M'KEAN, *Chief Justice.*—At the common law there could be no appearance in any suit, real, personal, or mixed, whether as Plaintiff or Defendant, but in proper person; except where the King, by virtue of his prerogative, granted his writ for an Attorney; and where an infant appeared to defend a suit by his guardian. The statute of *W.* 2. *c.* 15. declares that if an infant is eloined, so that he cannot sue personally, his next friend shall be admitted to sue for him; and *c.* 10. of the same statute, enables all persons of full age to sue and defend suits by attorney.

But the appearance of an infant to a suit brought against him, is not a judicial act. The appointment of a guardian to defend the suit; and the taking his examination when a fine is to be levied, a recovery to be suffered, or a statute staple, &c. to be acknowledged, are judicial acts. Most clearly, however, the appearance in this case, is error.

The authorities cited by the Council for the Defendant in error, to shew, that after his full age, the party cannot take advantage of his previous infancy, appear to be restricted to real actions, and to fines and recoveries, which are, in their operation, mere modes of assurance. But we are likewise, clearly of opinion, that, in other cases, a judgment against an infant may be reversed after *full age*, and that the fact must be tried *per pais* and not by inspection. *Moore* 460. *Hardwick's Cases* 104. *Hetly* 65.

Let the judgment below be reversed.

1786.

PIRATE, *alias* BELT *v.* DALBY.

SINCE the act for the gradual abolition of slavery, a number of persons have formed a society in *Philadelphia*, for the purpose of relieving those of their fellow creatures, who are held in illegal slavery; and this action is owing to that institution.

The Plaintiff, being the supposed issue of white and mulatto parents, attended the Defendant to *Philadelphia* in the autumn of 1784, and presented so pure a complexion, that the attention of the society was excited, and a writ of *habeas corpus* taken out at their instance.

The boy's right to freedom was first argued before Mr. Justice BRYAN, and, the next day, before the same Judge, and the CHIEF JUSTICE, at their chambers; when the facts being disputed, the CHIEF JUSTICE advised the Council to throw the case into the form of an action *de homine replegiando;* and recognizances to appear, being entered into on both sides, a declaration was filed of *September* term 1784, stating that "the Defendant *Dalby* had taken and kept captive the Plaintiff, *Francis Belt*, whereby the said Plaintiff is injured, &c." To this the Defendant pleaded, that the Plaintiff was his slave, and the Plaintiff replied that he was a free man, *absque hoc*, &c. rejoinder and issue.

Upon the trial, which was by a struck jury, it was given in evidence, that the Plaintiff was born in *Maryland*, of an unmarried *mulatto* woman; that the grandmother, and the mother of the Plaintiff, are now, and always have been, slaves; that he was purchased by the Defendant's agent, and that the sale was then in dispute in law in *Maryland;* that the Plaintiff had not been *six months* in *Pennsylvania* when the *habeas corpus* was brought; and the Plaintiff himself was shewn to the Jury, that they might from his appearance draw some conclusion, that he was, at least on one side, the issue of white parents.

Mifflin, for the Defendant, having proved by the laws of *Maryland*, that the boy was a slave in that State, contended that the *lex loci* must determine this, as well as other personal and mixed actions; and for that doctrine, cited, among many other authorities, 1 *P. Will.* 420. *Preced. in Chan.* 207. He said that the rule, *partus sequitur ventrem*, was founded on reason and the law of nature, and as applicable in other countries as in *Maryland*. 1 *Puffend.* 599. 693. *Iust. Inst. l.* 13. § 4. and he observed, that even in *Pennsylvania*, the Legislature had taken notice of other than *negroes* and *mulattoes*, to wit, *Indian* slaves. 1 *Pen. Laws*, 46.

The *Attorney General* and *Lewis* argued for the Plaintiff. They said, that, in *Pennsylvania*, there was no positive law for slavery; though as the acts of Assembly took notice of three sorts of slaves, *Negroes*, *Mulattoes*, and *Indians*, they admitted that, by a reasonable construction, this might be rendered tantamount to an

1786. express toleration. But they contended, that even under this admission, the maxim which declares that *expressio unius, est exclusio alterius*, must be applied to the Plaintiff's case, and, consequently, as he was neither an *Indian*, a *Mulatto*, nor a *Negro*, he cannot be enslaved by mere implication. With respect to the *lex loci*, they allowed its force in regulating contracts; but insisted that it could never be extended to injure a third person, who was not a party to the contract; which the Plaintiff had not been in the present instance; and having thus answered the adverse arguments they laid down four propositions, on which they meant to rely.

1st. That, however the case may be at *civil law*, by the *common law* the issue follows the condition of the father. 2 *Black. Com.* 390. *Fortesc. de Laud.* 98. 103. *Litt.* § 187. 188. 11 *State Trials* 343.

2d. That a bastard being *Nullius filius*, is free; for, he who can gain nothing by inheritance, ought to lose no part of his natural freedom by relation to his progenitors. 2 *Bl. Com.* 94. *Co. Litt.* 123.

3d. That things, not persons, are the objects of property. 2 *Bl. Com.* 2. 16. 1 *Bl. Com.* 423.

4th. That property in a slave, if it does exist, cannot be transferred without deed. *Litt.* § 183; and, consequently, as it is not in evidence, that the Plaintiff was sold to the Defendant by deed, the Defendant has not proved him to be *his* slave, however the general question may be against the Plaintiff.

The CHIEF JUSTICE delivered the following sentiments, in the course of an elaborate charge to the Jury.

M'KEAN, *Chief Justice*.—The issue is whether the Plaintiff is a freeman or a slave. If the Jury think, from the evidence, that the Plaintiff's mother was a slave at the time of his birth, according to the laws of *Virginia*, where he was born; we will point out the legal consequence that flows from the establishment of this fact.

Slavery is of a very ancient origin. By the sacred books of *Leviticus* and *Deuteronomy*, it appears to have existed in the first ages of the world; and we know it was established among the *Greeks*, the *Romans*, and the *Germans*. In *England* there was formerly a species of slavery, distinct from that which was termed *villenage*. *Swinb. p.* 84. 6 *Edit.* is the only authority I remember on this point, though I have before had occasion to look into it with attention. But from this distinction has arisen the rule, that the issue follows the condition of the father; and its consequence, that the bastard is always free; because, in contemplation of law, his father is altogether unknown, and that, therefore, his slavery shall not be *presumed*, must be confined implicitly to the case of *Villeins*. It would, perhaps, be difficult to account for this singular deviation in the law of *England*, from the law of every other country upon the same subject. But it is enough for the present occasion to know, that as *villenage* never existed

in *America*, no part of the doctrine founded upon that condition can be applicable here. The contrary practice has, indeed, been universal in *America;* and our practice is so strongly authorized by the civil law, from which this sort of domestic slavery is derived, and is in itself so consistent with the precepts of nature, that we must now consider it as the law of the land. 1786.

There is a case in 2 *Salk.* 666. which has not been mentioned at the bar, though it bears considerable relation to the present controversy. It was an action of *indebitatus assumpsit* for a negro sold; and it was said by HOLT *Chief Justice*, that a negro by entering *England* becomes free; but that a sale in *Virginia*, if properly laid, will support the action. Hence, we perceive, how solicitous the courts of that kingdom have been, on the one hand, to discountenance slavery in *England*; but, on the other hand, to do full justice to the sale, which, by the *Lex Loci*, was lawful in *Virginia*, where it was made.

It only remains to observe, that property in a negro may be obtained by a *bona fide* purchase, without deed.

VERDICT for the Defendant.

KUNCKEL *et al. v.* BAKER.

THIS was an application for a special Court, founded on the act passed the 10th *of April*, 1782. *Kunckel*, the petitioner, set forth in his affidavit, that one of the Plaintiffs, *Boom*, with whom he had been in partnership, had dissolved their connection, since the commencement of the action, and that the outstanding debts had been assigned to *Kunckel* so as to vest in him the whole interest in the event of the action. It was also stated that *Kunckel* was about to depart from the United States; but that *Boom* had no such intention.

The *Attorney General*, for the Defendant, objected, that, by thus assigning the interest in an action to a going foreigner, a special Court, and an early judgment, might always be within reach, to the prejudice not only of the Defendants but of other creditors. And upon this ground THE COURT unanimously refused the prayer of the petition.

The Plaintiff's Council then moved, that he ought not to be deprived of his bail by this application; which, requiring a declaration to be previously filed, amounted to an acceptance of a common appearance.

In the justice of this motion, THE COURT concurred, and accordingly directed a rule to be entered, that the Defendant give bail in two months, or a *procedendo*.

Rawle for the Plaintiff.—*Bradford* for the Defendant.

1786.

MOORE's Lessee, *v.* FEW, *et al.*

THIS was an *Ejectment* for certain premises in the county of *Philadelphia.*

After solemn argument by *Wilcocks* and *Rawle*, for the Plaintiff; and the *Attorney General* and *Sergeant*, for the Defendant; THE CHIEF JUSTICE delivered the opinion of the Court, that the word *transfer*, being used among the disabilities to which *non-jurors* are subjected by the act of Assembly, passed the 13th of *June* 1777, the testator *John Hunt*, under whose *devise* the Plaintiff's title was made. being at the time of his death a *non-juror*, was incapable of *devising* lands and tenements.

And consequently the Defendants, claiming under the heir at law, had judgment.

Common Pleas,

PHILADELPHIA COUNTY.

June Term, 1786.

DUTILH *v.* RITCHIE.

THIS was a *Replevin* for divers goods, wares, &c. and property was pleaded in *Andrew Clow*, and others, assignees for the benefit of the Defendant's creditors.

The facts were these:—The Defendant had bought certain goods, for which he gave a promissory note, that was afterwards indorsed to the Plaintiff, who went (probably by desire of the Payee) to purchase goods from the Defendant on the 8th of April 1785, about five o'clock in the afternoon. He told the Defendant, on entering his shop, that he came to take goods in payment of the note, and the Defendant (whose attention was taken up, at the same time, by several other customers) handed him such articles as he pointed out, mentioning their respective prices. The Plaintiff marked those pieces which he approved of, and laid them on one side of the counter, 'till he thought he had chosen sufficient to answer the note, and then informing the Defendant that he would go for a porter to remove them, he left the shop without receiving a bill of parcels, or stipulating a time of payment, or tendering the promissory note to the Defendant. Immediately after the Plaintiff had left the shop, the Defendant

1786. shut it up, and called a meeting of his creditors; for whose benefit, the next morning, and before this *replevin* was served, he executed an assignment of all his property.

It was held by THE COURT, that the property in the goods for which the *replevin* issued, was not vested in the Plaintiff; and the Jury found a verdict accordingly for the Defendant.

Moylan for the Plaintiff.—*Millegan* and *Rawle* for the Defendant.

SHOTWELL *v.* BOEHM.

TRESPASS for *mesne profits*, after recovery in *ejectment*.

It was ruled by THE COURT, that the Plaintiff shall not give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration in ejectment; although the present action was brought by the lessor of the Plaintiff.

Rawle for the Plaintiff.—*Sergeant* for the Defendant.

Supreme Court of Pennsylvania:

September Term, 1786.

GRIER *et al. v.* GRIER.

AFTER argument by *Bradford* and *Sergeant* for the Plaintiffs, and *Wilcocks* and *Ingersol* for the Defendant, THE CHIEF JUSTICE delivered the judgment of the Court in this cause.

M'KEAN, *Chief Justice*.—This is an action of debt upon an arbitration bond; the Defendant prayed *Oyer* of the obligation and condition; the condition was to submit to the award of five persons, concerning "the exchange of a number of loan office certificates, and of, upon and concerning an action of slander now depending between the said parties," and also of all other matters, differences, and demands, &c. The Defendant thereupon pleaded, that the arbitrators made no award. The Plaintiffs replied, and set forth an award, whereby (among other things) the arbitrators did award and order, "that in consideration of the loss sustained by the exchange of certificates between *John Grier*, deceased, and the said *Joseph Grier*, senior, the said *Joseph Grier* pay to the executors of the said *John Grier*, the sum of one hundred and seventy five pounds;" and then the Plaintiffs aver, that they are the executors of the testament and last will of the said *John Grier*, deceased, in the said award mentioned and intended, and that to them the said sum of £. 175 by the said writing of award was ordered to be paid by the said *Joseph Grier*, senior. To which the Defendant demurred, and the Plaintiffs joined in demurrer.

The exception taken to this award is, that the £. 175 were ordered to be paid by the Defendant to the *Executors of John*

1786. *Grier*, *deceased*, who are *strangers*, and that an award cannot be holpen by an *averment*, but must be expounded by itself and nothing *dehors*. In support of which, the Defendant's Council cited, 1 *Bacon*'s *Abr.* 139. *Hob.* 49. *Carth.* 157. *Godbolt* 13. *Dyer.* 242. 1 *Ld. Raym.* 123. 1 *Bac. Abr.* 141. and *Law of Arbitrators* 119.

For the Plaintiffs, it was argued by their Council, 1st. That it appears sufficiently on the face of the award, that the Plaintiffs are the executors of *John Grier*, by a fair and probable presumption. 2d. That an averment may be of any thing not inconsistent with the award. 3d. That the executors of *John Grier*, deceased, are persons certain and known. And, *lastly*, that if the executors were *strangers*, yet the award is good; for the Defendant ought to have rejoined, that the executors were strangers. For which positions were cited 1 *Burr.* 277. 1 *Bacon Abr.* 135. 139. 141. 145. 147. 1 *Ld. Raym.* 612. 246. 533. *Cro. Jac.* 200. 354. *Cro. Eliz.* 858. 8 *Co.* 98. 3 *Vin. Abr.* 121. *Comyns* 329. *Carth.* 136. 1 *Leon.* 316. 3 *Leon.* 62.

It may not be amiss to observe, that the rules established in *England* before the revolution, respecting the construction of awards, have been more liberal and favourable than formerly; that many of the nice distinctions to be met with in our law books, are by no means to be admitted as precedents in expounding awards at this day; and that, as arbitrators are judges of the parties own choosing, for the furtherance of justice, and quieting of controversies, the courts have of late construed their awards with great latitude, and according to their intention, appearing from the words of the whole. 1 *Burr.* 277. 1 *Bacon Abr.* 139.

However, two of the essentials in awards are, that they should be certain and final. By the condition of the bond in this case it appears, that a particular controversy between the parties was, "about the exchange of a number of loan office certificates," and, by the award, the Defendant is ordered to pay to the executors of *John Grier*, deceased, £.175, in consideration of the loss sustained by the exchange of certificates between the said *John Grier* and him. From these it may be collected, and the meaning of the arbitrators seems to be, that a *loss* had been sustained by the exchange of certain loan office certificates between a certain *John Grier*, deceased, and the Defendants, that this *loss* affected the Plaintiffs in some way or other, because it was made an express article in the submission, and that the payment of the money to the executors of *John Grier*, should determine the controversy on this account. *John Grier*, deceased, has *executors*, who they are may be easily ascertained; as easily as the *costs* of an action, or the *charges* of a voyage, which have been adjudged to be good awards, because they can be reduced to a certainty. 3 *Cro.* 383. *Beale* v. *Beale* and 1 *Rolls Abr.* 251. So that this award appears to be certain enough. Besides, if the executors are considered as *strangers*, yet, by the better authorities, an award to pay money to them shall be intended for the benefit of the Plaintiffs, and that they, being the submittants, were either the

executors, or authorized by them, unless the contrary appear 1 *Salk.* 74. 3 *Leon.* 62.

With respect to the observation, that an award is to be interpreted by its own words, and not by any matter out of it, it is law; but when the words of an award have relation to things certain, out of the award, these things may be averred. 1 *Rolls Abr.* 264. *Stile* 365. *S. C.* And, therefore, as the executors of *John Grier*, deceased, are persons certain, we think that it may be averred, who they are by name, as has been done by the replication in the present case, were such averment necessary; for it is only explaining more particularly what was contained in the award itself.

Upon the whole, the Court is of opinion, that the award in this case is good. Let judgment be entered for the Plaintiffs.*

LEE *v.* BIDDIS.

ON the trial of this cause, *Lewis*, for the Plaintiff, offered evidence to prove what was the money meant to be paid by the contract entered into between the Plaintiff and Defendant, under the words *current lawful money;* and cited *Morris* v. *Wharton.*†

Sergeant objected to the evidence, and cited 1 *Atk.* 447. 2 *State Laws* 494. *Dav. Rep.* 48. 72.

BY THE COURT. *Current lawful money*, by the positive words of the act of Assembly, means such money as is current at the time of entering into the contract; and, perhaps, the evidence offered would not so much contradict the contract itself, as that act of Assembly: it would be to substantiate an agreement in direct opposition to the law. The case in *Davis*, if we could be bound by it at all (which we do not think we can, first, because it is not a judicial determination; and, secondly, because it is before judges in *Ireland)* would be in favour of the Plaintiff, if it had not been for this act of Assembly. But, indeed, if this evidence were admitted, it would open a door to such a scene of litigation, that, independent of the act, the argument *ab inconvenienti* never applied in greater force.

The evidence was accordingly over-ruled, and the Plaintiff voluntarily suffered a nonsuit.‡

KERLIN's Lessee *v.* BULL *et al.*

THIS cause now came before the Court on a special verdict, returned upon the trial of an ejectment for a messuage and lands in the township of *East-Whiteland*, in the county of *Chester*. It was ably agrued on the 27th of *April*, by *Sergeant* and *Bradford* for the Defendants, and *Lewis* and *Wilcocks* for the Plaintiff;

* See 2 *Dall. Rep.* 180. † *Ante* 135. ‡ See 2 *Dall. Rep.* 175.

1786. and, THE COURT having taken time to consider of their judgment, it was this day pronounced by the CHIEF JUSTICE.

M'KEAN, *C. J.*—This cause was tried at *Nisi Prius* in *Chester*, when the jury found a special verdict, which contains the following statement:—That a certain *John Hunter*, being seized in fee of the premises in question, on the 30th of *July* 1751, made his last will and testament in writing, duly executed, and, among other things, devised in the words following: "I give and bequeath to my eldest son *James* when he arrives at the age of twenty one years, all and singular the messuage, &c. to hold to him, his heirs and assigns for ever." "*Item*, I give and bequeath unto my youngest son *John*, *when* he arrives to the age of twenty one years, one hundred acres of land, that I bought of *John Chads*, known by the name and called *Jehu's Hundred*, and the house and lot of seven acres of land, lying on the south west side of the *Connestogoe* road near the *Whitehorse* sign; to hold to him, his heirs and assigns for ever." That the estate devised to the youngest son *John* is the one in question. That afterwards he devises "to his wife *Anne* the use and profits of all his said lands and tenements, for the maintenance and education of his children, until his said sons should attain to their several ages aforesaid successively." That the testator died seized thereof, leaving *James*, his eldest son, and *John*, *Margaret*, *Hannah*, *Elizabeth*, *Anne* and *Mary* his children, and also *Martha*, who intermarried with *John Rattew*, one of the Defendants. That the other Defendant intermarried with the daughter *Anne*. That *John*, the devisee, died in the year 1769, under age, intestate, unmarried, and without issue, living his mother, his brother *James* and all his sisters. That the lessor of the Plaintiff has the estate that was in *James*, who was found to be the heir at law of *John*.—But whether, upon the whole matter, the Defendants be guilty of the trespass and ejectment, the jurors know not, &c. in common form.

The questions that arise upon this special verdict, are two—1st. Whether the estate vested immediately in *John*, or remained in *contingency* 'till he came of age?—And, if it be a vested devise, 2dly. Whether the lands in dispute went to *James*, his eldest brother, as his *heir at common law*, or were subject to distribution, under the act of Assembly, amongst his brothers and sisters, as he died intestate, under age, unmarried, and without issue?

To prove, that it was a *contingent and lapsed* devise to *John*, the Council for the Defendants cited 3 *Bacon's Ab.* 478. 1 *Burr.* 227. and 2 *Salk.* 415. and insisted, that where the time is annexed to the *substance* of the gift, and not to the *possession*, there it is a lapsed devise, by the devisee's not living until the time specified.

And, to show, that if the estate vested immediately in *John* by the devise, upon the death of his father, yet it descended and was to be distributed equally among his surviving brother and sisters, they produced the "Supplement to an act of Assembly, intitled, "An act for the better settling intestates estates," passed the 23d of *March*, 1764, in page 307 of the first volume of *Pennsylvania*

Laws: And also cited a case, determined at *Nisi Prius* in *Bucks* county, by Judges *Lawrence* and *Willing*, in 1773, in an ejectment by *Joseph Heister*'s Lessee v. *Jacob Lambert;* wherein *this point* was ably argued and adjudged for the party claiming distribution.* 1786.

For the Plaintiff, it was insisted, that this was a vested devise, and in support thereof, they cited 3 *Bacon*'s *Abr.* 478. 2 *Vent.* 366. 3 *Co.* 21. 8 *Vin.* 370. *pl.* 13. 373. *pl.* 12. 16. *Gilb. Rep. in Eq.* 36. 2 *Mod.* 289. 2 *Freeman* 243. 2 *Vern.* 561 and 1 *Burr.* 228. And that the cases mentioned on the other side were of lapsed *legacies*, and not *devises*.

And, on the 2d question, they urged, that the original act of Assembly, as well as the supplement, must be taken into consideration, and then it will appear, that the supplement only related to such lands as should come to a child from an *intestate* father or mother by descent, and not to those he should acquire by *purchase*, as in the present case, by the *will* of the father. And that this case does not come within even the words of the act, which are, "if after the death of any father *and* mother, any of their children shall die in their minority and intestate, but not otherwise, &c." for the *mother survived* the son *John* the devisee. It was further said, in answer to the case cited to have been determined at *Nisi Prius* in *Bucks*, that the two Judges did not pretend to be skilled in the law, and that they were obliged to give their judgment on a sudden and without deliberation, and that therefore it ought to have little or no weight.

The Court have detained this action under advisement until now, and with respect to the first question, whether the devise to *John* is a vested, or contingent and lapsed devise? they are clear, that to effectuate the intention of the devisor, it must be construed a *vested* devise.

The *absolute property* is given to *John* when he should arrive at age, and the use and profits in the mean time to his mother, for the maintenance and education of all the children. This last devise is a *particular* interest, and no more than a chattel interest. The son *John* was the principal object of the testator's bounty, and if he had married, and died before 21 years of age, leaving *children*, he certainly meant not that this estate should go from *them*. This, therefore, was an *immediate gift* to *John*, though he was not to have the *possession* until he came of age. All the cases support this judgment. Legacies are governed by the *rules* of the civil and ecclesiastical courts; devises by the *intention* of the testator.

The 2d question is, Whether by the intestate laws of this State, the lands in dispute belonged to the eldest brother *James Hunter*, or to all the sisters and him equally, upon the death of *John* intestate, under age, unmarried, and without issue?

I will make an observation or two, previously to my delivering the particular opinion of the Court on this point.

* See *ant.* 20.

1786.

1. Where the intention of the Legislature or the Law is doubtful, and not clear, the Judges ought to interpret the law to be, what is most consonant to *equity*, and least *inconvenient*. *Vaugh.* 38. 285.

2. A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also. *Vaugh.* 383.

We will now have recourse to the supplementary act of Assembly, 1 *State Laws* 397, and consider the words and the spirit of it. In the case before the Court, *John Hunter*, the devisee, died intestate, under age, unmarried and without issue, after the death of his father, his mother surviving him. The words of the act are, after the death of any father *and* mother, so that he was not within the words; but I am of opinion, that the word *and*, in this place, must be construed *or;* as in the very next sentence the mother is given an equal share of the personal estate of such intestate child, which came from the father, with the brothers and sisters of such child; which shews, the Legislature did not mean that the estate should not be distributed, unless both parents were dead. The clause, respecting the real estate of an infant intestate, does not take notice or distinguish, whether it was to come from the father, or mother, by *descent or purchase*, or *how* it was to be acquired, or from *whom;* but says, generally, that *all his lands*, &c. shall be divided, &c. And, it is remarkable, that the personal estate of such an intestate is to go in the same manner with the real estate: But in the following sentence there is an express provision for the mother out of that part of the personal estate, to which the intestate shall be entitled under *such father;* which shews, manifestly, that the mother was not to have any share of any personal estate that should be acquired by such child, in any other manner than from the father; and perhaps they meant in both cases an *intestate* father; but this is by no means clear; it is very doubtful from the disposition of the personal estate, that was acquired differently; and our constitution and laws favour equality and distribution of estates.

This act of Assembly has been made upwards of twenty years ago, and the question upon it now before the Court has received at least one judicial determination thirteen years ago, that the real estate, in such a case, should be distributed among the intestate's brothers and sisters equally. When there has been a solemn determination before two Judges of the Supreme Court after debate, and an acquiescence under it, there ought always to be great consideration paid to it, that the law may be certain. Upon the best information we can obtain from the gentlemen of

the law in different parts of the State, we find that estates have been distributed agreeably to this determination: And as this construction of the act has been so long accepted and received as a rule of property, though some may not be satisfied in their private judgment, were the matter to be newly resolved, it is but reasonable we should acquiesce and determine the same way in so doubtful a case, to prevent greater mischiefs which may arise by shaking a number of estates, and from the uncertainty of the law. 1786.

Let judgment be entered for the Defendants.

High Court of Errors and Appeals of Pennsylvania:

September Sessions, 1786.

PURVIANCE *et al. v.* ANGUS.

THIS was an Appeal from the Court of Admiralty. It was argued on the 7th and 8th of *July* by *Lewis*, *Wilcocks*, and *Sergeant* for the Appellants; and by *Bradford*, *Ingersol*, and *Wilson* for the Respondent. The Court held the matter for some time under advisement, in hopes that a compromise would have taken place between the parties; but on the 27th of *September* THE CHIEF JUSTICE delivered the following judgment.

M'KEAN, *Chief Justice*.—I will state the case as it appears before the Court from the proceedings, and the evidence, which are not controverted on either side; and shall then take notice of those points which have been disputed.

The Appellants on the 28th day of *August* 1779, were owners of a Brigantine, called the *Hibernia*, then riding at anchor in the port of *Philadelphia*, and appointed the Respondent master and commander, on a voyage from thence to *Oratavia* in the island of *Teneriffe*, having a commission as a Letter of Mart and Reprisal. The owners, in the sailing orders then delivered to the Respondent, (among other things) "advised him to keep company with the armed vessels bound to the Eastward as far *as he should think it prudent*; and that should they agree to cruize two or three weeks on the coast, he had *their approbation* in joining with them." The Respondent sailed on his intended voyage,

and in the river *Delaware* joined the Brigantine *Achilles*, where- 1786.
of *George Thompson* was master, and the *Patty*, whereof *John Prole* was master, each having a commission of Letter of Mart; and about the 1st of *September* following they proceeded to sea in company, standing to the Eastward.

On the 6th of *September* in the forenoon a firing of cannon was heard by people on board the *Achilles* and *Patty*, and in the afternoon the *Achilles* and *Patty* had *altered their course*, and, being swifter sailors than the *Hibernia*, left her at some distance; they then waited for her, and when she came up, she inquired the reason of their *altering* their course, and was informed, that they had seen two sail and given them chase. At this time the two vessels were not in sight, the *Achilles* and *Patty* having waited for the *Hibernia* until they were lost: They all three then continued the same course until the morning, when at day light two vessels were descried, *lying close together*, by each of the masters of the three Brigantines, who forthwith made towards them; and the *Achilles* and *Patty*, after firing a few guns, took possession of a Brigantine, called the *Betsey*, which had been a *British* vessel, bound from *Montferrat* for *New-York*, (which places were then possessed by the enemy) *and was captured the day before by the Argo sloop of war, belonging to the United States, Silas Talbot, Esquire, Commander.* At this juncture the *Hibernia* was a few miles astern of the other Brigantines, and when she came up, the Respondent asked, "what vessel they had brought too?" and was answered, "a Brig from *Montferrat* bound for *New-York*; a good prize." In consequence of some conversation with the Captains of the two other vessels, the Respondent sailed in pursuit of the *Argo*, then in sight, and did not rejoin them, until near sun-set, when a boat came along side from the *Patty*, and asked for men to assist in navigating the *Betsey* into some port: The Respondent immediately put *two men* into the boat, and signed *orders* for *William M'Neal*, who had been appointed Prize-master, which contained these words, "to get her if possible into *Delaware*, *Egg-harbour*, or *Chesapeak*, *for fear of the* SLOOP *Argo* falling in with you, if you go to *New-England*;" and "beg of *M'Neal* to stand to the *Southward* this night and strive hard for *Philadelphia*." These orders are dated "the 7th *September* 1779, at sea on board the Brigantine *Patty*," and were signed first by *John Prole* and *George Thompson*. So far the facts are agreed.

Mr. *William Davis*, who was a passenger on board the *Patty*, swears, "that he *verily believes*, the firing of cannon on the 6th about ten o'clock in the forenoon, was heard on board the *Hibernia*, and that the people on board each of the three Brigs saw two vessels engaged in fight, for that he heard and saw them distinctly; that the three lay becalmed within hail of each other, that the *Argo* and *Betsey* were then about three leagues distant from the three Brigs, and that the firing continued more than an hour." He further is positive, that the Respondent and *Prole* and *Thompson* had a consultation, in his presence, about the brig *Betsey*,

1786. whether she was prize or not; and that they concluded to secure her as a prize, as they disbelieved what had been said by *West* and *Church* about her being prize to the *Argo*, or if she was, yet, as they had been in sight at the time of the capture, they were entitled to a share. These facts are also confirmed by the deposition of *John Groves*.

On behalf of the Respondent, the depositions of *John Brice*, first mate of the *Hibernia*, *John Magill*, *George Stout*, *George Eldridge* and *Aaron Ashbridge*, mariners on board, and of Doctor *Wilson Waters*, Surgeon of the *Hibernia*, prove, that *they* did not see the *Argo* and *Betsey*, nor hear any firing of cannon, on the 6th of *September*, and that neither Captains *Prole* nor *Thompson* were on board the *Hibernia* on the 7th, nor was the Respondent on board of either of their vessels. In which last particular *Davis* and *Groves* concur. These witnesses also differ with *Davis* and *Groves*, about the hour that the *Hibernia* sailed in pursuit of the *Argo*, the duration of the chase, and the time of her return and rejoining the other Brigs.

It has also been given in evidence, that a suit had been instituted in the Admiralty by Captain *Silas Talbot qui tam*, &c. against the owners of the three Brigantines, for the spoliation of the *Betsey* and her cargo, who, upon an Appeal to this Court, were decreed to pay £. 11,141 5 4 damages to the Libellant, besides the costs, of which sum the present Appellants, as owners of the *Hibernia*, paid £. 3,795 3 6 and toward costs on the 22d *January* 1785.*

Upon this state of the case, two questions arise:—The 1st of *fact;* the 2d of *law*.

1. With respect to the *fact*, there are two points, 1st. Whether the Respondent did *willingly* join the two other Captains *Prole* and *Thompson*, in the tortious capture of the *Betsey* from the *Argo*, *knowing* her to have been a prize to the *Argo*, and that the *Argo*, was a *friend?* This would undoubtedly have been a *lata culpa*, an evident trespass, to call it by no harsher name.

If he did not, then 2dly, Whether he was guilty of such *gross negligence* (*crassa negligentia*) as by law will make him responsible to the Appellants, considering the relation between them as owners and master of a vessel?

As to the 1st point, the evidence is not so satisfactory as might be wished in a case of such consequence to the parties. Had there been evidence given respecting the credit of the several witnesses, the matter would have been clearer. If *Davis* and *Groves* are to be credited, in addition to the other evidence, there is a very strong presumption indeed, that the Respondent is guilty of a great wrong, of a clear trespass; for if he saw the fight on the 6th, as he next day found that the *Betsey*, which had been captured, was an *enemy*, he must have concluded, that the *Argo*, was a *friend*. And if all that the other witnesses swear in behalf of the Respondent, is true, yet I do not think, that the evidence of *Davis* and *Groves* is thereby invalidated. With respect to hours or times, in which particular occurrences or transactions happened,

* See *ant.* 95.

witnesses of the greatest integrity may and often do differ: This has happened in the cause before us. But as to other matters, the witnesses on board the *Hibernia* only swear, "that they did not see nor hear, what the others say, they did." The rule in such a case is, "that one affirmative witness countervails the proof of many negative, because both may swear true," and such interpretation should be put on the whole testimony, as to reconcile it; for, one may see and hear what another does not. *Gilb. Law of Evidence* 157. However, it does not appear necessary to determine this first point, as the second question admits of little difficulty, *viz.* Whether the Respondent has been guilty of such *gross negligence* as should make him responsible? 1786.

The Respondent was near to the *Betsey*, as well as the two other *Letters of Marque;* he might have gone on board her, and made every necessary and proper inquiry; he sent two of his crew on board her, to get her if possible into *Delaware*, &c. he signed the order to *M'Neil*, the Prize-master, which must have shewn, to perfect conviction, that the *Betsey* had been captured by the *Argo*, and that she was a *friend*. But it is said, that he confided in *Prole*, whom they had made Commodore, and in *Thompson;* that they deceived him; and that he signed the orders to the Prize-master without reading them; and, in short, that he implicitly obeyed, and did whatever he was told to do. The Respondent should have reflected, that the seizing a valuable vessel and cargo was a serious piece of business, if belonging to a friend; he should therefore have weighed the consequences of his credulity in others; he could have inquired for himself, and had the same evidence with *Prole* and *Thompson;* he should have considered, that his owners placed their confidence in *him*, and in *no other;* he should have acted for himself, and taken care that he did no injury to any one. But he does not appear, by the defence made for him, to have exercised his own judgment at all. Was this using proper care and diligence, or was it inexcusable conduct, and gross negligence?

2. Let us now consider the law upon this evidence; for, *ex facto oritur lex*. It is agreed, that every one of the parties to a trespass, who participates in it, is a trespasser, and an action will lie against him as a principal; for, there can be no accessary to a trespass: *Bro. trespass, pl.* 113. 1 *Lev.* 124. that a trespass was committed in taking and carrying away the *Betsey* from the Commander of the *Argo;* that the Respondent was present, aiding and assisting in the taking and carrying her away: and that Captain *Silas Talbot* could have maintained his suit against the Respondent, as well as against his owners, for the wrong and injury they have done to him. But, it is contended, that though he might be responsible to Captain *Talbot*, he is not so to his owners, for that his relation with them was by contract, and the contract between a servant and his master, or between a Captain of a ship and his owners, points out the measure of the Servant's or Captain's responsibility; that he ought not to be accountable in damages for an *error in judgment*, but only for the *fault of the heart*, and that he acted according to the best of his judgment;

1786. and his error in this business arose from the misinformation and deception of *Prole* and *Thompson*. In support of this doctrine were cited 1 *Blackst. Com.* 422. 309. 3 *Bl. Com.* 163. 3 *Bac. Abr.* 544. 564. 4 *Co.* 83. 84. 10 *Mod.* 109. 4 *Burr.* 2060. 11 *Mod.* 135.

In reply to this, it has been agreed, that the Master or Commander of a Privateer or Letter of Marque may *lawfully* stop the ship of a *friend*, examine her papers, the people on board, the cargo, &c. in order to discover, whether she belongs to a *Friend*, or an *Enemy;* and if upon the whole it should be doubtful, to bring her into port, for further inspection and trial, without breaking bulk, or imbezzlement of the lading. But if the captor imbezzled the cargo, disposed of or used any part of it, sent away the captured mariners, or did any other acts, which shew he could have *no reasonable doubt*, in such case he is liable for damages and costs. *Lee on Captures* 202. 240. *Beawes L. M.* 207. 1 *Rolls Abr.* 530.

It is insisted upon, that a master of a ship is one, who for his knowledge in navigation, fidelity and discretion, hath the government of the ship committed to his care and management; that he must give an account for the whole charge, and, upon failure, render satisfaction: And, therefore, if misfortunes happen, if they are either through the *negligence*, *wilfulness* or *ignorance* of himself, or mariners, *he* must be responsible; and his owners may sue him for reparation of damages, jointly or separately, both according to the common law, and marine law. See 1 *Vol. Laws of Admiralty* 186. *Beawes L. M.* 49. *Bath. Nisi Prius* 24. 3 *Keeble* 444. 3 *Bac. Abr.* 564. 3 *Black.* 163.

A great loss then has been sustained by the injury done in the seizure of the *Betsey;* it will be heavy, and must finally fall upon the owners or master. If the bringing the *Betsey* too, for the purpose of enquiring whether she belonged to a friend or an enemy, was lawful, the subsequent conduct was unlawful, and the seizors became thereby *trespassers ab initio.*

This was a *lata culpa* in *Prole* and *Thompson* at least, the Respondent was present aiding and assisting in carrying her away from the *Argo.* If one does a trespass, and others *do nothing but come in aid*, yet all are principal trespassers. *Bro. Trespass. pl.* 232. 20. *Vin. Abr.* 460. *title Trespass. pl.* 3. *and fo.* 466. *Letter U.* If A *comes in aid* of B, who beats me, yet he is a trespasser as well as B. 22 *Ass.* 43. If the conduct of the Respondent was not *wilful* and with *full knowledge*, yet it appears to us to have been a *crassa negligentia*, and that any reasonable man, upon inquiry, and the least reflection, upon reading the orders given to the Prize-master *M'Neil*, (and he ought to have read them) or upon the circumstances attending the whole transaction, must have been satisfied, that the *Betsey* was a prize to the *Argo.* It is a wrong position, that a master of a ship is not answerable for an *error in judgment*, but only for the *fault of the heart*, in *civil* matters. In *criminal* cases, as well in others as in a master of a ship, it is true. One *non compos mentis* is answerable civilly for

a wrong done to another. Reasonable care, attention, prudence, and fidelity, are expected from the master of a ship, and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, *he* is responsible in a civil action. And it must appear very strange to any understanding, that the owners of a vessel should be answerable in damages for the misconduct of the master, merely because they appointed him master, and that the master, the actual malfeazor, should not be accountable over to them; that the innocent should suffer, and the guilty person go scot-free. We know of no such law. 1786.

Upon the whole, THE COURT are of opinion, that the sentence of the Court of Admiralty be reversed; * and this Court do decree and adjudge, that the Respondent do pay to the Appellants the sum of £.3,795 3 6, and the interest thereof from the 22d day of *January* 1785, together with the costs by them paid in the former cause by *Silas Talbot qui tam*, against them and others, and also the costs of this suit in the inferior Court, and that each party shall pay their own costs in this Court, the same to be taxed by the Register, or this Court.

ATLEE and RUSH, *Justices*, dissented from this opinion of the Court, for reasons which they assigned separately and at large.†

The Council for the Respondent afterwards moved the Court for a re-hearing upon a suggestion of new evidence, &c. and upon that occasion, Judge SHIPPEN made the following observations:—

SHIPPEN, *Justice:*—When this Court delivered their decree that the Respondent should pay to the Appellants the sum of £.3,795 3 6, they estimated the damages by what they conceived to be the value of the vessel and cargo, having then, I believe, no doubt but that the loss sustained was the proper measure of damages. The conduct of the Respondent, though certainly unjustifiable, appeared from the evidence to be attended with such favourable circumstances, that if the idea had been entertained that the damages were discretionary, and could have been legally diminished, I, as one of the Court, should certainly have given my voice for a much less sum. Whether the Court had, or had not, such a discretionary power, was not made a question on the hearing, but has since occurred to me; and having met with a case which goes a great way towards establishing the principle, I should be willing to have the case re-heard as to this point. The case I allude to, is that of *Russel* v. *Palmer* in 2 *Wils.* 325. which was a special action on the case against an Attorney for negligence, in not charging the Defendant in execution within two terms after the judgment, whereby the Plaintiff lost his debt, the Defendant having obtained a *Superseders*, agreeably to a rule of the Court of King's Bench, and had been discharged out of custody. On the trial of the cause before Lord *Cambden*, a verdict was given for the Plaintiff for £.3000, the whole debt, by the Chief Justice's direction. But, afterwards, on a motion for a

* See the evidence, and the sentence of the *Admiralty*, reported by the honourable Judge of that Court, in the volume referred to *ant.* p. 95

† See Judge *Rush*'s opinion in the appendix.

1786. new trial, the Chief Justice himself and the rest of the Court were of opinion, that he had misdirected the Jury in telling them, that they ought to find a verdict for *the whole debt*, whereas the action, *sounding merely in damages*, the Jury ought to have been left at liberty to find what damages they thought fit. Accordingly a new trial was ordered, and on the second trial the Jury were told, that they might find what damages they pleased, and on some favourable circumstances appearing for the Defendant, they found only £.500 in damages.

The similarity of this case with that before the Court, inclines me strongly to admit a re-hearing of the cause as to this point, whether, if the Court should be of opinion that the Respondent is answerable on the point of gross negligence, they are bound to estimate the damages by the real loss, or whether they may not mitigate them, according to the circumstances and degree of negligence in the Respondent.

THE COURT, on consideration, directed a re-hearing as to this point only; and, after argument, reducing the damages, they gave the following judgment:

The Court do award, that the Respondent do pay to the Appellants the sum of £.948 15 10 1-2, and the interest thereof from the 22d day of *January* 1785, together with the fourth part of the costs by them paid in the former cause by *Silas Talbot qui tam* against them and others; and also the costs of this suit in the inferior Court; and that each party pay their own costs in this Court; the whole of the aforesaid interest and costs to be taxed by the Register, or this Court.

Common Pleas,

PHILADELPHIA COUNTY.

September Term, 1786.

CHAPLIN *v.* KIRWAN.

THE Referees, in this case, had allowed *ex parte* evidence to be given, of the current price of Coach-maker's work, at the time when the cause of action accrued. For this reason, the Defendant moved to set aside their report.

And BY THE COURT: If Referrees make enquiry abroad, to ascertain for their own satisfaction, the price of work, or the truth of any other matter, which may be said, comparatively, to be of a public nature, this, so far from being irregular, would be highly commendable. But it is a very different case, when they proceed separately to examine a witness, who has been produced by one of the parties, although the evidence relates only to those general points. The adverse parties should have an opportunity of cross-examining the witness.

The Report set aside.

HOOTON *v.* WILL.

IT was ruled in this cause, that a judgment shall not relate to the first day of a term, so as to cut out a domestic attachment.*

* See the S. C. *post.*

1786.

INNES *v.* MILLER.

REFERREES, having settled their minds with regard to their report, sent for the Plaintiff, and asked him whether he would agree that a quarter's rent, which accrued after the action brought, should be taken into the settlement, and the Defendant credited for it, which would have made the balance in favour of the latter. This the Plaintiff refused to comply with, and withdrew, without being asked another question, or saying any thing further upon the subject.

A motion was now made to set aside the report.

BY THE COURT. Referress ought to proceed, not only so as to do justice, but to avoid the appearance of injustice; lest a precedent should be established, which might afterwards be perverted to a bad use. Misbehaviour is, therefore, a reason for the Court to interpose and set aside a report, no less than partiality and corruption. Referrees, however, are allowed greater latitude in their proceedings than juries. They are not equally bound to time and place, nor to the same strictness of method in receiving testimony. A reference would be of little service, if a report were liable to be set aside, for an irregularity so small as that mentioned by the Council, in the case of *Baron*'s *Lessee* v. *the Proprietaries*, for the South-street lots, that of merely handing in a paper to the Jury by mistake, which was only a copy of an original produced at the trial. Suppose, in the present instance, the Referrees had adjourned, and in the intermediate time, meeting *Innes* in the street, should make the proposal mentioned to him—surely this would not set aside the report. It is true, that the manner in which it was done, gave room for some suspicion, and the Defendant had a right to presume, that all was not fairly conducted. But the fact is satisfactorily explained by the Referrees, and we do not think it such misbehaviour as will invalidate the report. Therefore,

Let Judgment be entered for the Plaintiff.

JAMES *et al.* *v.* ALLEN.

THE case was this:—The Plaintiffs and the Defendant had been concerned together in trade; and upon settling their accounts, a considerable balance appeared against *Allen*; for the recovery of which an action was brought in the State of *New-Jersey* in *May* 1782; and judgment was therein obtained in *November* following, when a *Fi. Fa.* issued, and on a return of *Nulla bona* to that writ, a *Ca. Sa.* was sued out returnable to *May* 1783. In the mean time, the Defendant, on the 27th of *April* 1783, was arrested in *Pennsylvania* for the same debt, and gave bail; but, on his return to *New-Jersey*, he was there taken on the *Ca.*

Sa. which had issued in that State against him; and afterwards, in *October*, 1783, was discharged by their act of Insolvency. A rule to plead had been entered in the action brought in *Pennsylvania* at *June* Term 1783, and judgment was signed for want of a plea, at the ensuing *September* Term. 1786.

Bradford moved to set the judgment of this Court aside, or to open it, in order to admit the Defendant to plead the proceedings and discharge in *New-Jersey*.

Upon the argument it was stated, and agreed, that no person was entitled to relief under the Insolvent Law of *New-Jersey*, who was not born in that State, or had not resided in it one year free from arrest; that a man indebted to any amount was entitled to the benefit of it; that a person not in execution was not excluded; that the act requires notice to be inserted in the public papers of *New-York* if the debtor lives in *East-Jersey*, or in those of *Pennsylvania* if he lives in *West-Jersey;* and that every debtor, who complied with the terms of the act, became thereby expressly discharged from all debts due at the time of the assignment of his effects for the use of his creditors, or contracted for before that time and payable after, "*so far as regards the imprisonment or detention of his person.*"

Bradford and *Lewis*, in support of the motion, contended that the benefit and effect of the *New-Jersey* law ought, in the present case, to be extended to *Pennsylvania*, as well by the general principle of the law of nations, as by the particular obligation arising from the articles of confederation.

1. They observed, that by *the Law of Nations*, every transaction, not yet completed, which has a view to its completion in a foreign country, must be determined according to the municipal law of that country: But, if perfectly complete in the country in which it originated, the *Lex Loci* that decided, must protect it in every other country where the validity of the transaction is called in question. 1 *Black. Rep.* 258. 2 *Burr.* 1078. *Finch* 186. 2 *Show.* 231. If the validity of a contract depends upon the laws of a foreign country in which it is perfected, and cannot be affected by any arguments drawn from the laws of the country where a subsequent action is brought, certainly a judicial decision (which, like an act once in force, but afterwards repealed, vests a right in the party, though its immediate operation is impeded) cannot be otherwise expounded and enforced than by the laws of the country where it is pronounced: And proceedings under the insolvent act amount to a judicial decision; for, they determine a debt, and give a remedy. *Sir T. Raym.* 473. They might, indeed, be said to amount to more; as, in giving the creditor all the advantage of the debtor's effects they become a species of execution, and, therefore, may be considered a satisfaction. It is no small injustice, when a debtor has been compelled to assign all his effects, when he has given every satisfaction that he possibly can, to pursue his footsteps, on every change of situation, and commit him again and again into custody. If the suit in *New-Jersey* had terminated in another manner, for in-

1786. stance, by a verdict in favour of the Defendant, that would clearly have been a bar to the action here.

2. But, should the Defendant find no protection under the law of nations, *the 4th Article of the Confederation* effectually supplies that defect. The article declares, that "full faith and "credit shall be given in each of these States to the records, "acts, and judicial proceedings, of the Courts and Magistrates of every other State." Now, if a judgment, or other judicial proceeding in *New-Jersey*, had not been evidence before, this provision (to the true sense of which the law of *Pennsylvania* is subservient) would have made it so—if it was only *prima facie* evidence before, this would render it conclusive. What Lord *Mansfield* declares in *Doug.* 5. to be the case with respect to certain Courts in *Westminster-Hall* (whose decisions and proceedings are unexaminable evidence) is also true when applied to the several Courts of Justice in the States of the *American* Union; and the discharge in *New-Jersey* may be carried about by the Defendant into each of those States, as an impenetrable suit of armour to guard him from all future attacks upon his liberty, for a cause of action existing at the time it was granted.

The motion was opposed by *Coxe*, *Ingersol*, and *Sergeant*, who argued that judgments in foreign Courts were only *prima facie* evidence, except in Courts of Admiralty whose decrees were conclusive, because founded upon the law of nations, which is common to all the world; that as a judgment without satisfaction could not bar an action for the same debt in another country, 3 *Atk.* 598. much less would the proceedings under the act in question, which did not extinguish, or even alter the debt; but only discharged the person of the debtor from arrest within the State of *New-Jersey*. That this was entirely a municipal regulation, calculated to protect the inhabitants of *New-Jersey* from their creditors in *New-York* and *Pennsylvania;* to the inhabitants of which states, the citizens of *New-Jersey* (owing to their having no sea-port, and paying an interest of 7 *per cent.* for money) were constantly indebted; so that the extention of the act did not deserve to be favoured here. That in the case of *Lopez*, in the Court of Appeals, and in the cause between *Connecticut* and *Pennsylvania*, depositions taken in *Connecticut*, according to one of their statutes, were not admitted to be read, because contrary to the common law. That the payment of interest for money lent, was the only instance regulated by foreign laws. That a certified *English* bankrupt, was liable to arrest in *Ireland*. That, even if the validity of a foreign proceeding is admitted, a right to examine the ground, upon which it was founded, remains; and, therefore, that it might be proved, that the Defendant was not entitled to the benefit of the act; as he was not a native of *New-Jersey*, nor had he resided there one year previous to the arrest. That, upon the whole, it would be extremely hard, after the creditors on the spot who, having joined in the petition according to the directions of the act, had shared the spoils, an absent creditor, who never knew of the discharge, should be barred.

SHIPPEN, *President*.——This is a motion, in effect, to discharge the Defendant from execution, on the ground of his having been confined by a *Ca. Sa.* for the same debt in the State of *New-Jersey*, and there discharged as an insolvent Debtor, by virtue of an act of Assembly of that State: And the question is, whether the discharge of his person from imprisonment there, will entitle him to a like discharge here? 1786.

It is contended, that the decisions of even foreign Courts of Justice, shall have a binding force here; and that in the situation in which we stand with regard to *New-Jersey*, a sister State, we are under an additional obligation to pay respect to the decisions of the Courts there, by the terms of the Articles of Confederation.

The Judgment of a foreign Court establishing a demand against a Defendant, or discharging him from it, according to the laws of that country, would certainly have a binding force here: And not only the decisions of Courts, but even the laws of foreign countries, where no suits have been instituted, would in some cases be taken notice of here; where such laws are explanatory of the contracts, and appear to have been in the contemplation of the parties at the time of making them; as if the interest of money should be higher in a foreign country where the contract was made, than in that where the suit was brought, the foreign interest shall be recovered, as being understood to be part of the contract. But it does not follow that every order of a foreign Court with respect to the imprisonment of the Defendant's person, or any local laws of that country, with regard to his release from confinement, can have the effect of restraining us from proceeding according to our own laws here. The insolvent law of *New-Jersey* relates not to the substance of the Plaintiff's demand, which had already been established, but merely authorizes the Court to make an order, on certain terms, for the discharge of the Defendant's person from imprisonment; which order has no connection with the merits of the cause, and cannot with any propriety be called the judgment of the Court in that action; and the law itself on which the order was founded, is a private act, made for that particular purpose; it is local in its nature, and local in its terms.

Insolvent laws subsist in every State in the Union, and are probably all different from each other; some of them require personal notice to be given to the creditors, others do not, as in the present case; and they have never been considered as binding out of the limits of the State that made them. Even the Bankrupt laws of *England*, while we were the subjects of that country, were never supposed to extend here, so as to exempt the persons of the Bankrupts from being arrested.

The Articles of Confederation, which direct that full faith and credit shall be given in one State to the records, acts, and judicial proceedings, of the others, will not admit of the construction contended for, otherwise executions might issue in one State upon

1786. the judgments given in another; but seem chiefly intended to oblige each state to receive the records of another as full evidence of such acts and judicial proceedings.*

Whatever might have been the effect of an order or judgment of the Court of *New-Jersey*, if it had actually discharged the Defendant from the Plaintiff's *demand*, the present order, as well as the act of Assembly on which it is founded, is local in its terms, and goes no further than to discharge him from his imprisonment in the *Gaol of Essex County in the State of New-Jersey*; which, if the fullest obedience were paid to it, could not authorize a subsequent discharge from imprisonment, in another gaol, in another State.

The motion is, therefore, not granted.

* See post. *Phelps* v. *Holker*, *Millar* v. *Hall*, *Thompson* v. *Young*, in the *Supreme Court*. *Gorgerat* v. *M'Carty*, Com. Pl. 2 *Vol.* 100. *Donaldson* v. *Chambers*. 3 *Vol.* 369. *Emory* v. *Greenough*. 1 *East's Reports* 6. 2 *H. Black.* 553.

Supreme Court of Pennsylvania:

January Term, 1787.

GREGORY's *Lessee v.* SETTER.

EJECTMENT for a House and Lot.—The Plaintiff's Council offered to give parol evidence of the declaration of the Grantor made *after* the execution of a deed, and cited 2 *Chan. Ca.* 180. *Gilb. For. Rom.* 232. 233. 2 *Atk.* 71. 150.

It was opposed by the Defendant's Council, who admitted that parol evidence might be given of a declaration made *before*, or *at the time*, of the execution of the Deed; but contended, that it was not admissible to prove a declaration *after*; and they cited 1 *Atk.* 447. 520. 1 *State Laws* 462. 2 *Ca. in Chan.* 180. 1 *P. Will.* 111. 112. 2 *Vent.* 361. 1 *Vern.* 567. 5 *Bac.* 375. 2 *Black. Rep.* 1249. 1250.

BY THE COURT:—In this case a deed was made of the house in question to Mrs. *Gregory* in fee simple: and evidence is offered to prove, that the purchase was made with the money of her deceased husband, part of which belonged to his children, and that the purchase was for their and her use. If she acknowledged this fact at any time, it amounts to a confession against herself, which may certainly be given in evidence.

Let the witness be sworn.

MORRIS *v.* FOREMAN.*

IT was RESOLVED in this case, upon a motion for a non-suit,—1*st*. That the Court will allow the Plaintiff in an action upon a Bill of Exchange, to strike out a special, as well as a general, indorsement on the Bill. 2*dly*. That a protest for non-payment must appear under a notarial seal; but it is not necessary that the non-acceptance should be certified in the protest; for, that may be sufficiently established by other evidence. 3*dly*. That the possession of a Bill of Exchange is evidence of an authority to demand payment of its contents.

* This case is cited and explained in *Gorgeral et al. v. M'Carty*. 2 *Vol.* 144.

Common Pleas.

PHILADELPHIA COUNTY.

June Term, 1787.

GERARD *v.* LA COSTE *et al.*

THIS case came before the Court on a special verdict, and, after argument, the following judgment was pronounced by the PRESIDENT.

SHIPPEN, *President*.—This action is brought against the acceptors of an inland Bill of Exchange, made payable to *Bass and Soyer* and indorsed by them, *after the Acceptance*, to the Plaintiff for a valuable consideration. The Bill is payable to *Bass and Soyer*, without the usual words "or order" "or assigns," or any other words of negotiability. The question is, whether this is a Bill of Exchange, which, by the law merchant, is indorsable over, so as to enable the indorsee to maintain an action on it against the acceptors, in his own name.

The Court has taken some time to consider the case, not so much from their own doubts, as because it is said eminent Lawyers, as well as Judges, in *America*, have entertained different opinions concerning it. There is certainly no precise form of words necessary to constitute a Bill of Exchange, yet from the earliest time to the present, merchants have agreed upon nearly the same form, which contains few or no superfluous words, terms of negotiability usually appearing to make a part of it. It is indeed generally for the benefit of trade that Bills of Exchange, especially foreign ones, should be assignable; but when they are so, it must appear to be a part of the contract, and the power to assign must be contained in the Bill itself. The drawer is

1787.

the lawgiver, and directs the payment as he pleases; the receiver knows the terms, acquiesces in them, and must conform.

There have doubtless been many draughts made payable to the party himself, without more, generally perhaps to prevent their negotiability:—Whether these draughts can properly be called Bills of Exchange, even between the parties themselves, seems to have been left in some doubt by the modern Judges. Certainly there are draughts, in the nature of Bills of Exchange, which are not strictly such, as those issuing out of a contingent fund; these, (say the Judges in 2 *Black. Rep.* 1140.) do not operate as Bills of Exchange, but, when accepted, are binding between the parties. The question, however, here, is not whether this would be a good Bill of Exchange between the drawer, payee, and acceptor, but whether it is indorsable.

Marius's *Advice* is an old book of good authority; in *page* 141 he mentions expressly such a Bill of Exchange as the present, and the effect of it, and he says, that the Bill not being payable to a man *or his Assigns*, *or Order*, an assignment of it will not avail, but the money must be paid to the man himself. In 1 *Salkeld* 125, it is said, that it is by force of the words, "or order" in the Bill itself, that authority is given to the party to assign it by indorsement.—In 3 *Salk.* 67 it is ruled, that where a Bill is drawn payable to a man, "or order," it is within the custom of merchants; and such a Bill may be negotiated and assigned by custom *and the Contract of the Parties*. And in 1 *Salk.* 133 it is expressly said by the Court, that the words "or to his order," give the authority to assign the Bill by indorsement, and that without those words the *Drawer* was not answerable to the indorsee, although the *Indorser* might.

An argument of some plausibility is drawn in favour of the Plaintiff from the similarity of promissory notes to Bills of Exchange. The statute of 3 & 4 of *Anne* appears to have two objects; one to enable the person to whom the note is made payable, to sue the drawer *upon the Note* as an instrument (which he could not do before that act) and the other to enable the *Indorsee* to maintain an action in his own name against the drawer. The words in this act which describes the note on which an action will lie for the *Payee*, are said to be the same as those on which the action will lie for the indorsee, namely, that it shall be a note payable to any person, *or his Order;* and it appearing by adjudged cases, that an action will lie for the *Payee* although the words "or order" are not in the note, it follows (it is contended) that an action will also lie for the *Indorsee*, without those words. If the *Letter* of the act was strictly adhered to, certainly neither the *Payee*, nor *Indorsee*, could support an action on a note, which did not contain such words of negotiability as are mentioned in the act; yet the construction of the Judges has been, that the original payee may support an action on a note not made assignable in terms. The foundation of this construction does not fully appear in the cases, but it was probably thought consonant to the *Spirit* of the act, as

1787. the words "or order" could have no effect, and might be supposed immaterial, in a suit brought by the payee himself against the maker of the note. But to extend this construction to the case of an *Indorsement*, without any authority to make it, appearing on the face of the note, would have been to violate not only the *Letter* but the *Spirit* of the act. Consequently no such case any where appears. On the contrary, wherever the Judges speak of the effect of an indorsement, they always suppose the note itself to have been originally made indorsable. The case of *Moore* v. *Manning* in *Com. Rep.* 311. was the case of a promissory note originally payable to one *and his Order;* it was assigned without the words "or order" in the indorsement; the question was, whether the assignee could assign it again: The Chief Justice, at first, inclined that he could not, but it was afterwards resolved by the whole Court, that if the Bill was originally assignable, "as it will be (say the Court) if it be payable to one and *his Order*," then to whomsoever it is assigned, *he* has all the interest in the Bill, and may assign it as he pleases. Here the whole stress of the determination is laid upon what were the original terms of the Bill, if it was made payable to one *and his Order*, it was assignable, even by an indorsee without the word "order" in the indorsement; it follows, therefore, that if the Bill was not originally payable to order, it was not assignable at all. The same point is determined, for the same reasons, in the case of *Edie & Laird* v. *the East India Company*, in 1 *Black. R.* 295, where Lord *Mansfield* says, "the main foundation is to consider "what the Bill was in its origin; if in its original creation it was "a *negotiable draught*, it carries the power to assign it." In a similar case, cited in *Buller*'s *Nisi Prius* 390, the Court held, that as the note was in its original creation *indorsable*, it would be so in the hands of the indorsee, though not so expressed in the indorsement.

These cases leave no room to doubt what have been the sentiments of the Courts in *England* upon the subject. To make Bills, or notes, assignable, the power to assign them must appear in the instruments themselves; and then, the custom of merchants, in the case of Bills of Exchange, and the act of Parliament, in the case of notes, operating upon *the Contract of the Parties*, will make them assignable.

In the case before us, no such contract appears in the Bill. The acceptance was an engagement to pay according to the terms of the Bill *to Bass & Soyer;* a *subsequent* indorsement, not authorized by the Bill, cannot vary or enlarge that engagement, so as to subject the acceptor, by the law merchant, to an action at the suit of the indorsee.

Judgment for the Defendant.

1787.

SHOEMAKER v. KNORR.

JUDGMENT. *Fi. Fa.* returned, and *Vend. Exp.* to *Dec.* Term, 1786, returned by the Sheriff, "Proceedings staid by the Plaintiff." The Sheriff afterwards made sale of the premises, and the Plaintiff took a *precipe* from his Attorney, for an *Al. Vend. Exp.* returnable to *March* Term 1787, but before the return day of the term, the sale had been made, although the *precipe* was not delivered, and no writ made out till after the term, when the Prothonotary, on the application of the Sheriff, issued an *Alias Vend. Exp.* returnable to *June* Term.

It was now moved to alter the *teste* and return, by the *precipe;* that is, to make the writ returnable at *March*, instead of *June* Term.

Sergeant, the Defendant's Attorney on record, did not oppose the motion, but declared, that as his authority was determined by the judgment, his consent could not be obligatory on his client.

THE COURT, after some deliberation, granted leave to make the alteration moved for; resting, it seemed, upon the ground that the *precipe* furnished something to amend by.

Rawle for the Plaintiff.—*Sergeant* for the Defendant.

PHILE qui tam v. The Ship ANNA.

THIS was an information filed by the Naval Officer of the port of *Philadelphia*, against the ship *Anna*, lately arrived from *Bristol* upon the discovery of *Peter Cooper*, that forty two hampers of porter, part of her cargo, had been landed, without being first duly entered at the Collector's office, conformably to a law of this state, passed the fifteenth day of *March*, one thousand seven hundred and eighty seven, which enacts, among other things, "That every vessel or boat, from which any goods, wares, or merchandise, shall be unladed before due entry thereof, at the office of the Collector of the port of *Philadelphia*, and every carriage into which any such goods shall be first put or loaded, after removal from such vessel or boat, together with the horse, horses, or cattle drawing the said carriage at the time of seizure, shall be forfeited, and seized by the Collector last aforesaid, or the Naval Officer, or any of his or their deputies, &c." It appeared in evidence to the Jury, upon the part of the informants, that the Captain of the *Anna*, had only exhibited twenty hampers of porter in his official manifest, whereas a much greater quantity was found on board the ship, besides forty two hampers landed and deposited in the store of one *Smith*, and twenty four hampers actually delivered on shore to the captain himself, agreeably to his orders given for that purpose in the store of the claimants. It was proved, likewise, that a considerable number of hampers of porter, had, during the passage, been removed from the

1787. hold, and stowed away in the state-rooms, filling from the floor to the ceiling, so that any person who was in the least attentive, must have observed them upon entering the cabin; and it appeared, that the owners and their agent had been several times on board before the seizure, and before the removal of the hampers from that situation. The customary privilege of a captain in the *Bristol* trade was described to be limited to one ton, and the gross number of the hampers of porter discovered by the informants, was computed to amount to a little more than eighteen tons. The mate, who, the claimants alleged was the delinquent on this occasion, had been retained in their service, on board the ship, for two or three weeks after the seizure; but he had lately absconded, under the apprehension of a prosecution for the penalty of £. 500.

For the claimants, it was given in evidence by a passenger, that he was told by the mate of the *Anna* (who it seems was a man of some property) that he had clandestinely shipped a quantity of porter, which he intended to dispose of here, without paying the freight to the owners, or the duties to the state, and which he had an opportunity of doing, even without the captain's knowledge, as it was the custom for mates to superintend the loading and unloading of the vessel. The witness had likewise during the passage, purchased about a dozen of porter from the mate, who then solicitously requested that the circumstance might not be communicated to the captain; and who (as several witnesses proved) after his arrival at *Philadelphia*, had treated with several persons for the sale of porter, repeatedly informing them that it was his private adventure, and that the owners of the vessel had not a bottle on board. When the hampers were removed at sea, from the hold into the cabin, the captain, who had long been indisposed, was then particularly sick, owing to his exertions during a storm that had happened the preceding night; and the father of one of the owners who had taken charge of the vessel upon her arrival, affirmed that he did not, while in the cabin, observe the hampers that were stowed away in the state-rooms; that he had been very cautious in directing the manifest to be made out according to the invoices and bills of lading, and that he had personally enjoined all the officers of the ship, not to land a single article without a regular permit from the collector. It was in proof, likewise, that a hamper of porter which the sailors were hoisting out of the hold, was hastily let down again upon the appearance of one of the owners.

The evidence on both sides being stated, the Council for the claimants argued, that the present question was of the greatest importance to the commercial interests of the country, as it was now to be determined, whether an innocent owner of a ship, was responsible for all the unwarrantable actions of her officers and crew? A rigid construction of the law, upon which this prosecution is grounded, cannot fail indeed, to counteract the object of the legislature in framing it: as the attempt to se-

cure our revenues by indiscriminately inflicting upon the unoffending merchant, the penalties resulting from the illicit practices of his captain, will so multiply the risques of commerce, that the hope of gain, and the ardour of enterprise must cease to operate, and in the eventual loss of trade will be involved the total dissolution of the impost system. We should, therefore, be particularly cautious what principles we establish at this crisis of our commerce, and, in imitation of the wise precedents transmitted to us by our ancestors; we should so interpret the letter of the law, as to render its operation reasonable and just, the source of punishment to the guilty, but of certain acquittal to the innocent. In the present case it has been fully demonstrated that the claimants were not interested in the commodity which has been surreptitiously introduced into this city, and that so far from knowing and consenting to the fraud, the utmost vigilance and circumspection were exercised on their behalf to prevent it. The questions then, to be now considered, may be fairly comprehended in an enquiry—How far the property of the owners is liable to confiscation for the misconduct of their officers and crew; and whether, by a liberal construction of the acts of Assembly, the ship itself, under all the circumstances appearing in evidence, is a subject of forfeiture? 1787.

1st. It must be admitted as a general rule, that the master is responsible for the agency of his servant, while acting in that capacity; but, on the other hand, the moment he steps aside from the line of his duty, this relative responsibility is at an end. Thus, if a drayman in drawing a pipe of wine, staves it, his master must certainly indemnify the owner to the value of the wine that is lost; but if he leaves his dray, engages in a quarrel, and does an injury to his antagonist, neither law nor justice will transfer the damages to his master. So, likewise, if a farrier's journeyman lames a horse in shoeing it, an action lies against the master, not against the servant; but still in this, and in every similar instance, the damage must be done while he is actually employed in the master's service, otherwise the servant answers for his own misbehaviour. It is, therefore, readily agreed by analogy to the principles thus established, that the claimants are responsible for the conduct of their officers, as far as it respects the business of navigation, and the cargo of the ship; but in no other view can the captain be considered as their agent, and consequently on no other account can they be affected by his transactions. What then is understood by the term cargo? The privileges allowed to the mariners are not surely to be comprehended in the description; and if a captain or a mate clandestinely exceeds his privilege, this ought not in justice to be a ground for altering the case. The meaning of the word *cargo* must therefore be restricted to such goods, wares, and merchandise, as belong immediately to the owners of the ship, or such as yield them a profit upon freight. Now, it is in evidence, that the porter, landed from the *Anna*, did not belong to the owners, and that they were not to receive any profit upon the freight of that article; it was conse-

1787. quently no part of her cargo: it had not been entrusted by the claimants to the superintendency of the captain or any other person on board; and therefore it cannot be said, that the entry was neglected by "them, their agents, factors, or consignees," which is expressly required by an act of Assembly, (and all the laws upon the subject must be taken together) in order to work a forfeiture. If this discrimination is disregarded, what vigilance, what precaution, can protect the property of the most upright merchant from confiscation? The tobacco pouch of a sailor, or the secret till of a passenger's chest, (for, according to the construction urged by the informants, the most trifling article is sufficient for their purpose) may contain the instrument of ruin, and it would be in vain to shew, that the sufferer was ignorant of the fraud, and diligent to prevent it, while *ita lex scripta est* furnishes the ready, but harsh answer to the sincerity of his plea. With respect to the cargo then, it is admitted, that, however improper the captain's conduct may be, it will affect his owners, even without their knowledge or connivance: but for any thing beyond the cargo, and such we allege is the commodity which gives rise to the present litigation, their knowledge is, at least, requisite, in reason, justice, and in law too, before they can be condemned to make atonement for his offences.

2dly. It has been already said, that laws should be so construed as to prevent an injury being done to the innocent; and accordingly a multitude of cases are to be found in which the force of the expression has been rejected, when evidently contrary to reason and justice. There was a law, that those who in a storm forsook the ship, should forfeit all property therein; and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came to port: the sick man kept possession and claimed the benefit of the law. Now, here, all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation. Again, there was an edict which condemned any man to death who should scale the walls of a certain city. One who had discovered the approach of an enemy, got over the wall at night in order to give the alarm. He was afterwards tried under this law, and, though the case came manifestly within the words, his judges pronounced, that it could not be the intention of the legislature to punish an action that proceeded from such meritorious motives; and therefore they acquitted him. But we have a memorable instance of a more recent date, arising from an ordinance of Congress, which declared, that any vessel conveying goods, &c. to the enemy, should be subject to capture and condemnation. A *Dutch* vessel, called "the *Golden Rose*,"

had been taken by a *British* cruizer, and while her captors were carrying her into *New-York*, she was retaken by an *American* privateer. It was seriously contended upon that occasion, that the *Dutch* vessel was a lawful prize according to the words of the ordinance; but the Court would not allow so extravagant a claim, grafted upon the strict letter, to pervert the politic but equitable meaning of the act of Congress. Let us then try whether the acts of Assembly, on the subject in discussion, may not by a liberal interpretation, operate so as to relieve the claimants from the injury with which they are threatened, and at the same time promote the rational views of the Legislature. In the section upon which the informants proceed, it is said, "that every *vessel or boat*, from which any goods, wares, or merchandize shall be unloaded, before due entry *thereof*, &c. shall be forfeited." Here then, if we understand the word *thereof* to refer to the entry of the vessel, though it may produce a slight deviation from the grammatical relation to the next immediate antecedent, we shall certainly give a more reasonable and benevolent explanation to the law, than by making the vessel liable to forfeiture for the non-entry of the goods, wares, and merchandize. By the first construction, a duty is imposed upon the owners, with which it is in their power to comply; by the second they are exposed to loss and ruin for the negligence or malversation of others, which they could not foresee, and cannot prevent. The ship, and its contents, are indeed distinct things in their nature, and may thus be rendered (as they ought to be) distinctly responsible for the management of those to whom they are entrusted. If the ship is not entered, let the penalty fall there; and if the cargo is not entered, let that be doomed to confiscation; but the idea of making them reciprocally responsible is contrary to natural justice, and must be incompatible with sound policy. No foreign merchant will trust his vessel in our ports, and no citizen of *Pennsylvania* will be hardy enough to engage in commerce upon such precarious terms. But it is to be farther observed in this place, that the Legislature having changed the expression, we may justly infer that the object of the law was likewise changed. In the preceding act relative to the impost, the words "*ship or vessel*" are employed, and not "*vessel or boat*" as in the section above cited: it is therefore to be presumed that it was only in contemplation to destroy the petty fleets of smugglers which infest our creeks and rivers; and as it is a maxim in law, that "a statute treating of things or persons, of an inferior rank, cannot by any *general words* be extended to those of a superior," *a ship*, which in maritime affairs is of the highest order, cannot be designated by the subordinate title of a *vessel*. 1787.

There is, however, an additional and very forcible argument, to shew that the informants are not entitled to a verdict of condemnation against the *Anna*, which is drawn from the regularity of the entry that has been made. By the act of Assembly, in

1787. which this cause originates, no form of entry is prescribed; we must therefore apply for instruction to the preceding impost law, which directs "the master of any ship or other vessel to exhibit to the collector a true manifest, signed by him, of all the goods, wares, and merchandize, imported in such ship or vessel;" and, after sundry other regulations, calls upon him to make oath, "that the manifest faithfully states the respective goods, wares, and merchandize therein mentioned, and that no other is laden or imported in his vessel to the best of his knowledge or belief." Has any of the requisites to constitute a formal entry been neglected by the master of the *Anna?* It appears that he has, in due season, exhibited an official manifest, and that he has sworn to the truth of its contents. This is surely all the law exacts, at least for the discharge of the ship; and though the omission of any article may be a cause for forfeiting that article (as it has already happened with the porter upon this occasion) and may likewise be a proper foundation for a charge of perjury, it cannot be extended to divest the property of an owner who has not practised any deceit himself, and who could not derive any advantage from the deceit practised by another.

The Council for the informants, in reply to the preceding arguments, stated: that the determination of this cause would certainly produce consequences of an important nature, and either render the act of Assembly upon which it is founded, a dead letter, or a productive instrument of public revenue. In governments differently constituted, where regal pageantry, or military force, can invite or compel respect and obedience to the law, little danger is to be apprehended from the occasional indulgence of learned men in their ingenious and novel comments upon the sense and expressions of the Legislature; but under a democratical constitution such as ours, should the people acquire a habit of yielding to logical subtleties and specious declamation, there is no power to control the evil that must ensue; the principles of jurisprudence would become weak and fluctuating, and the virtue and dignity of the Commonwealth would be contaminated and eventually destroyed. Instead therefore of considering how to escape from the strong expression of the act before us, it is our duty to give it the fullest operation that is necessary for suppressing the mischief to which the legislative attention was originally directed; and here we cordially embrace the position of our antagonists, that the meaning of those who framed the law is the best guide to direct us in carrying it into execution. What then was the evil complained of at the time that this act was made? The atrocious frauds committed upon the revenue. What was the remedy provided? It could not be merely the forfeiture of the smuggled goods, as the claimants insinuate, for that was imposed by an antecedent law; but the truth is, that every other penalty having proved ineffectual, this statute was enacted expressly to superadd the forfeiture of the vessel or boat from which the goods should be clandestinely unladed. But here it is remarked

that the Legislature has changed its language, and therefore it has changed its object—It would be idle, indeed, to attempt by argument to prove that a *vessel* is a term sufficiently comprehensive to describe *a ship*—but surely the sequel of the same law must remove every doubt, when it enacts, that "where forfeiture of the *ship*, vessel, boat, &c. shall have been incurred, the naval-officer and his deputies may seize the same." Again, it is said, that by dispensing with a rule in grammar, it will appear, that the neglect to enter the vessel herself, is the sole circumstance which exposes her to forfeiture. But if this construction is allowed, it follows, that every boat, as well as every ship, must be duly entered at the collector's office, for the sentence will then run in this way, "every vessel *or boat*, which, before due entry *thereof*, shall unlade, &c." a position that is necessarily defeated by its own absurdity. 1787.

The claimants pursuing this curious system of defence, have not only endeavoured to persuade us that the porter was no part of the cargo, but likewise that one hundred and thirty-two hampers (which was the gross quantity contained in the ship) make a mere trifle, too insignificant to produce a forfeiture. To these ideas how is it possible to oppose a serious refutation? The understanding of mankind is not at this day to be deceived by a distorted definition of words, nor will mere assertion be allowed to overthrow the strong evidence of the senses. Confine the meaning of the term *cargo*, according to their suggestion, to such goods, wares, and merchandize as belong immediately to the owners, or such as yield them a profit upon freight, and it may happen, that the ship shall be deeply ladened, and yet it will be said, that she has no cargo on board—a paradox not readily to be comprehended! But whence is derived this gigantic notion of things, through the medium of which the quantity of eighteen tons is considered as *a trifle?* No, this is not an insignificant article easily to be secreted; it cannot be squeezed into a sailor's tobacco-pouch, or stowed in the private till of a passenger's chest. We find that it occupied a considerable space in the hold of the ship, that it filled the state-rooms from the floor to the ceiling; and, besides the amount of the freight and tonnage, it ought to have contributed more than eighty pounds to the revenues of the state.

It is boldly said, likewise, that such an entry has been made, as is sufficient to satisfy the law, and to prevent a forfeiture of the ship: The master of the *Anna* has exhibited a manifest it is true—but is it not a partial statement? and can the accuracy of the form compensate for the fraudulent omission of a substantial item?

But the captain has sworn to the truth of the manifest—and can his perjury cure the evil, which his malversation has introduced?—This naturally calls for some observation upon the leading principle used on behalf of the claimants, to wit, their innocence, and total ignorance of the transaction, which has involved them in this prosecution. It is not necessary, and therefore it will not be attempted, to press the circumstances which raise a presump-

1787. tion, that the claimants were either acquainted with the conduct of their officers, or were guilty of the grossest negligence: but it should be remembered, that they might have seen the porter on board the ship, if, as their own witness expressed it, they had chosen to look—that the contraband unlading took place at their wharf, and but a few yards distant from their counting-house, that it was a matter known to every sailor on board the ship, and that the mate, who is supposed to have done them so severe an injury, was retained in their service for two or three weeks after the seizure. Still, however, the innocence of the claimants has no connection with the present question, which depends upon this single issue, whether the allegation contained in the information is, or is not true?—in other words—whether 42 hampers of porter have been unladed from the ship *Anna*, before they were duly entered at the collector's office? Much declamation indeed has been exercised upon this proposition, "that the innocent ought not to suffer for the guilty:" but, however just it may be in the abstract, the state of society necessarily introduces many striking exceptions. Thus, if a carrier is attacked by robbers, and after a brave defence is overpowered, notwithstanding his innocence and his misfortune, he is still answerable for the goods of which he was plundered; nay, if his master, on whom no shadow of blame could possibly be reflected, is called upon, he must render to the owner a full indemnification. Again: if a man lends a piece of furniture to another, which is distrained with the goods of the borrower for arrearages of rent, is there any thing culpable in his conduct? and yet the law works a forfeiture of his property, to satisfy the demands of the landlord. How many virtuous wives suffer for the depravity of their husbands—how many inoffensive children for the dissipation of their parents? In short, the relative obligations of social life are such, that we may trace the fortunes and happiness of mankind to a dependance upon the actions of each other, in almost every sublunary station—but in none is it more observable than in the important connection between master and servant. From every book that treats upon the subject, as well as from daily experience, we find that the master is responsible for the actions of his servant, the owner for the agency of his captain; but we shall readily concur with our antagonists in acknowledging, that this responsibility continues only while the servant or captain is engaged in the business of the master or owner.

What then is the present case? The law requires the master of any ship or other vessel to exhibit a true manifest, upon oath, to the collector of the port—does it not consequently become his duty to do so? and is not his neglect or evasion in this respect, a neglect or evasion committed, while in the actual transaction of the owner's business? Upon their own construction, therefore, the claimants are liable; and it is unnecessary for us to prove as we could do, that had the fraud been penetrated even by the sailors, a forfeiture of the vessel would have ensued. In *England*,

the owners to the utmost extent of their fortunes, were likewise amenable for the conduct of the mariners they employed, 'till an act of parliament interfered, and limited their responsibility to the value of the ship and cargo. In *Pennsylvania* a late determination has recognised the doctrine for which we contend;* and capt. *Angus* and the owners of the vessel which he commanded, have in vain pleaded their innocence and ignorance of the malpractice of others, to excuse them from the resulting damages. Such, after all, is the law—and it can be no ground for counteracting the evident intentions of the Legislature, that the claimants have been deceived by the persons to whom they have, perhaps, too implicitly confided their interests. 1787.

The PRESIDENT delivered the following charge to the jury:—

SHIPPEN, *President*.—This is an information exhibited against the ship *Anna*, as being a vessel from which 42 hampers of porter were unladed, without a previous entry at the collector's office. The evidence on the part of the informants proceeds from several witnesses, one of whom discovered the drays going from *Clifford*'s alley, and pursued them to *Smith*'s, where the porter was lodged. Two porters have proved the unlading, and the seizure; and by the manifest it appears, that only twenty hampers were entered, tho' 42 hampers were carried to *Smith*'s, 24 to the captain's store, and above 50 remained on board the ship:—so, the evidence is full and clear, that more goods have been unladed, than were entered with the collector. The claimants, on the other hand, have filed their claim, and say that no act has been done, which under the laws of *Pennsylvania* incurs a forfeiture—This, therefore, is the province of the jury to try and determine.

The words of the act of Assembly, upon which this prosecution is grounded, have been the subject of animadversion on both sides; but as they are few, we will repeat them. "Every vessel or boat, from which any goods, wares, or merchandize shall be unladed, before due entry thereof at the office of the collector of the port of *Philadelphia*, &c. shall be forfeited." Some doubts have been raised with respect to the thing meant to be entered; but the subject matter of the act, plainly refers to "goods, wares, and merchandize"—and it would be highly absurd if taken otherwise, as boats are never entered. This act does not say what shall be a due entry, but the next preceding one requires, that "the master of any ship or vessel shall exhibit to the collector a true manifest of the goods, wares and merchandize imported in such ship or vessel, &c. and swear that there are no other on board to the best of his knowledge and belief." It has been suggested, that the captain having delivered in a manifest, and sworn to it, this duty is done, and that in case of an omission, only the goods omitted are to be forfeited: But if the captain is obliged by law to deliver in a manifest, he does not comply, unles he exhibits atrue and accurate one: and his committing perjury upon the occasion, so far from saving the vessel, must greatly encrease the offence. This has been repeatedly called a hard law: but the truth

*See *ant.* 180.

1787. is, that revenue laws are of a harsher nature than any others, and necessarily so; for, the devices of ingenious men render it indispensable for the Legislature to meet their illicit practices with severer penalties.

Thus, if the Sheriff has a writ against any man, he cannot break open his door to execute it—but if liquor is smuggled into a cellar, the law says it is better that an individual should suffer in his personal privileges, than that the public should be cheated of its duties; and therefore allows the officer to force locks, &c. in order to make a seizure; in the first case, between citizen and citizen, a man's house is considered as his castle; in the second, between the public and the private character, it is no longer regarded in that sacred light. We do not mean, however, to reflect on laws of this description—we know they are necessary, as every society stands in need of assistance from its members. If the end can be accomplished without infringing the private rights of the subject, it is so much the better; but, at all events, the exigencies of government must be satisfied. It has been said, that, if the law is enforced as the informants contend for, the merchants will not be safe, no foreign vessels will be sent to our ports, and, eventually, the revenue must fail. But, nevertheless, it is requisite that such laws should be strictly worded, though, undoubtedly, there are cases where the construction of the words must be such, as to prevent more injury being done than was intended. The navigation act of *England* says, that goods imported as merchandize shall be forfeited, if they do not pay a certain duty; and the case in *Strange* 943. is a seizure of shirts, nightgowns, and caps under this law. It was there argued that the word "goods," would certainly include those articles, but the Judges were of opinion that it could not be the meaning of the Legislature to make wearing apparel subject to forfeiture. The case in *Bunbury* is the single one that reaches the point before us. There the question arises whether goods put on board secretly, and unladed without the knowledge of the captain, would occasion a confiscation; and the Judges agreed that if it was a small matter, and no part of the cargo, it would not. The claimants therefore to have the benefit of this case should shew, 1st, That the subject of the present prosecution, is a small matter. 2dly, That it was no part of the cargo, and 3dly, That it was smuggled without the knowledge of the captain.

1st. Then, a *small matter* is an indefinite phrase, not to be ascertained by mere words, but by the evident meaning of the Judges who used it; and from that criterion it should seem to be a trifling thing, easily concealed, and which might fairly escape the notice of the captain; but it cannot be extended to large and weighty goods, deposited in the hold of the vessel, and which then constitute a part of her cargo.* 2dly. The Council for the informants have suggested, that only such goods as belong to the owners, or yield them a profit upon freight can be called *a cargo;* whereas, in truth, the cargo is the lading of the vessel, and, though by bribery,

*See 2 *Dall. Rep.* 270.

or craft, some articles might be introduced into the hold without the knowledge of the owners or the captain, yet every thing which is put on board the vessel, is, in general, comprehended in that description. But 3dly. The knowledge of the captain is here proved by strong presumption. The quantity of porter that was put on board, the removal of it at sea, the evidence of the delivery of 24 hampers at his store, and by his order, are circumstances from which, we suppose, the claimants themselves, did not think his ignorance of the transaction tenable. 1787.

Then there remains only the great point upon which the Council for the claimants seem chiefly to rely, to wit, their innocence and ignorance, with respect to the fraud that has been committed. There is no evidence, indeed, that tends to shew, that the owners of the ship meant to do any thing unfairly; but, on the contrary, that the mate brought the goods hither with the avowed intention to defraud them, as well as the state. The question then recurs, what difference does it make, whether they knew of it or not? Here is a positive law that directs a due entry of all goods, wares, and merchandize imported into this state, under certain penalties, and one of them is the forfeiture of the vessel or boat from which they are unladed. It does not speak of the knowledge of any person, but seems to be studiously worded to avoid that construction. It is not a novel law, though perhaps it is stricter now than formerly: For, in *England* it has long existed, and before the revolution it was known in *Pennsylvania*. The Legislature has thought that nothing else would answer, and the Judges and the Jurors are equally bound to obedience. If indeed the law was doubtful or latitudinal, admitting one interpretation, which would be just, and another which would be unjust, it would become us to prefer the former. But if the policy of the Legislature seems to bear hard on the subject, we are not to judge, and determine upon its propriety—that is a matter for the deliberation of those who made the law—and however unjust it seems, we must acquiesce, or there must be a dissolution of society. It must certainly affect every humane man to see the innocent suffer; but in society this is not strange or uncommon; and the distinction may properly be taken between criminal and civil cases. The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence, the husband is not liable to the penalties; but if she obtains the property of another by any means not felonious, he must make the payment and amends. There are a variety of other instances, in which men are responsible for one another, in consequence of their connection in society. The drayman, if he drives over and kills a child, must himself suffer the judgment of the law—but if he staves a pipe of wine, his master must make the compensation.—Upon the whole, it is neither a hard nor a novel case, since men must occasionally employ others to act for them, and ought to answer for those in whom they confide. If the Legislature has thought proper to subject the owners to this forfeiture, we must submit. With the Jury, therefore, the power is

1787. happily lodged, which was formerly exercised by a single Judge, and it is their duty finally to acquit or condemn the ship, as in their consciences they think ought to be done.

The Jury, after a short adjournment, returned a verdict in favour of the informants.

JANUARY *Assignee v.* GOODMAN.

THE PRESIDENT, after argument and consideration, delivered the judgment of the Court in this cause, upon a point reserved at the trial.

SHIPPEN, *President*.—This is an action on the case, brought upon a writing said to be a promissory note, and declared upon as such. The form of it is not the usual form of a promissory note; it runs thus; "I promise and oblige myself and my heirs to pay to *January* and his Assigns," it concludes with the words "as witness my hand and seal;" and it *is actually sealed*. Two witnesses subscribe under the words "given in presence of us."

On the trial, the subscribing witnesses were not called, nor any evidence given of their death, or absence; but evidence was offered of the hand-writing of the Defendant, who subscribed the instrument, which was permitted to be given in evidence, on reserving the point.

In this case two questions arise; one regards *the nature of the Instrument*; the other *the sufficiency of the Evidence*.——

1. If the instrument is a *Specialty*, then it ought not to have been given in evidence, in an action of *Assumpsit*, on a promissory note. This general doctrine is not denied; but, it is said, it is not to be considered as a specialty, or deed, unless proof be made of its having been sealed and delivered as a deed; and that no such proof appearing, the Plaintiff had a right to consider it as a note of hand. That a deed cannot be regularly proved but by proving the sealing and delivery, there can be no doubt; as if *non est factum* be pleaded to a bond, the Plaintiff must prove the sealing and delivery,—this proof *lies upon him*. But, in the present case, the proof of the execution of the instrument as a deed, is attempted to be put upon the person *against whom* it is produced. The Plaintiff produces an *obligation* to support an action on a note—shall he say, *against his own shewing*, that unless you, the Defendant, prove this to have been sealed and delivered, it is no obligation, and I may consider it as a note? The Plaintiff himself *will not* prove it, and the Defendant *cannot*.—The instrument produced has the formal words of an obligation; it binds the party and *his heirs* to pay to another *and his assigns*—The words, "as witness my hand and seal," shew the intended nature of the instrument, and it actually appears *with a seal;* this denominates it a *specialty*. The definition of a specialty is thus given in 2 *Black. Com.* 465. "Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due, by an instrument *under seal*." That this is an in-

strument under seal, acknowledging a debt to be due, appears by inspection. If it be objected, that this seal might be put to it by a stranger, the side who alleges that, ought to prove it, especially if it be that side who has possession of the paper. 1787.

Should this attempt succeed, all legal distinctions, between specialties and other writings, would be confounded and destroyed at the will of the person producing them; and the wise provisions of the law to guard debtors against being *twice* called upon for the same debt, would fall to the ground, especially in the cases of assignable instruments.

2. If this were to be considered *not as a specialty*, but a *note*, then the second question would arise, whether being attested by subscribing witnesses, those witnesses ought not to be produced, or some account given of them. Promissory notes are not usually attested by subscribing witnesses, and, therefore, the ordinary mode of proving them is by witnesses to the handwriting; but if the parties will have subscribing witnesses, in what respect, and upon what grounds, can the distinction be drawn between the proof necessary in the case of notes and bonds? The rule of law as to the best evidence, which the law requires, is, that no such evidence shall be admitted which, *ex natura rei*, supposes still greater evidence behind in the party's own possession, or power. This rule applies equally to the withholding the best proof of the *signature of a note*, as of the sealing and delivery of a bond. If a note is not witnessed, it does not appear that any third person saw it signed, in which case, the best evidence is the handwriting of the party; but, if it be witnessed, then it appears, on the face of the note, that there is better evidence behind; and the best evidence that the nature of the case admits of, the law requires.

As no solid distinction between the case of bonds and notes can be shewn *upon principle*, so none appears from the *authorities*. Instrumental witnesses appear by the cases to be always called upon, and are equally necessary to prove those writings which are not under seal, as those that are; and the case in 2 *Stra.* 1149, which respects the proof of promissory notes before a jury of enquiry, is decisive.

On the whole, therefore, we are of opinion, that the law is with the Defendant upon both points, and there must be a new trial, or the Plaintiff may take a non-suit at his election.

Supreme Court of Pennsylvania:

September Term, 1787.

POLLARD v. SHAAFFER.

COVENANT.—The Plaintiff, and one *Martha Green* (now deceased) made a lease by indenture, dated the 1st of *March* 1773, of a Sugar-house, &c. to *John William Hoffman* and his assigns for five years at £. 70. *per ann.* payable quarterly. The Lessee covenanted for himself, his executors, administrators, *and assigns*, to keep the demised premises in good repair, and to deliver them up to the Plaintiff, at the end of the term, in such good repair, &c. *John William Hoffman* assigned the lease to the Defendant, who entered into the premises. The breach alleged in this action was, that the Defendant had not paid £. 35. rent in arrear for the last half year, nor delivered up the premises at the end of the term, to wit, the 1st of *March* 1778, in good order and repair: but that the roof, window-shutters, floors, &c. of the Sugar-house were in decay, destroyed, &c.

The Defendant pleaded performance of covenants, payment, and that an alien enemy, to wit, the *British* army, commanded by general Sir *William Howe*, on the 1st of *September* 1777, had invaded the city of *Philadelphia*, had taken possession of the premises, and held the same until the end of the term, and afterwards; and that during the period they held possession, they had committed the waste and destruction, &c.

To the last plea, the Plaintiff demurred generally; the Defendant joined in demurrer, and issue, &c.

The Demurrer was twice argued, on the 27th of *June* 1786, and on the 15th of *April* 1787, by *Coxe*, *Lewis*, and *Wilson* for the Plaintiff; and *Ingersol*, *Wilcocks*, and *Sergeant* for the Defendant: And, on the 6th of *October*, THE CHIEF JUSTICE pro-

nounced the judgment of the Court; Mr. *Justice* Rush having declined to give any opinion, as he had been of Council with the Plaintiff in this cause before he took his seat upon the bench. 1787.

M'Kean, *Chief Justice*.—Two questions were made in this cause:—1st, Whether the Defendant as *assignee* of the lease, is bound by the covenant to repair, as well as the *lessee?* And 2dly, Whether the special matter pleaded, is sufficient in law to bar the Plaintiff?

With respect to the *first* question, we are clear in our opinion, that the covenant to repair, and to deliver up the demised premises in good order and repair, runs with the land, being annexed and appurtenant to the thing demised, and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity; but in the case at bar the assignee is bound by *express words*, and, *a fortiori*, is answerable as well as the lessee. This point has been fully settled in *Spencer*'s *case*, 5 *Co.* 16. *b. and* 1 *Salk.* 199. 2 *Levinz.* 206. 1 *Rolls Abr. title, (covenant) letter M. pl.* 1, *and N. pl.* 2. *Vin. Abr.* 6. *vol. pa.* 411. *letter M. pl.* 1. 2. 1 *Bacon*'s *Abr.* 534. *c.* 5. and the books cited in these abridgments.

The *second* question is of great difficulty, and of very great importance in its consequence. We cannot find, that it has come *directly* before any Court in *England*, or in *Europe*. We wish, that it had come before abler judges than we pretend to be. However, we must give *our* judgment; but we do it with more diffidence than has occurred in any case since we have had the honour to sit here.

As there is no positive law, no adjudged case, nor established rule, or order, to direct the Court in this point, we must be guided by the principles of the law; by conscience, that infallible monitor within every judge's breast, and the original and eternal rules of justice. For equity is part of the law of *Pennsylvania*. 1 *Chan. Ca.* 141. *Grounds and Rudiments of law and equity, pa.* 74. *ca.* 104. *Doct. and Stud. lib.* 1. *cap.* 16.

It is agreed, that if a house be destroyed by lightning, floods, tempests, or enemies, without any concurrence of the lessee, or possibility of his preventing the same, this is no *waste* in the lessee: For, it is not done by the lessee's negligence, or any wilful act of his; and he cannot be charged with using it improperly, and it would thus have perished, even in the reversioner's possession. 1 *Inst.* 53. *b. Brook, Waste*, 69. 4 *Co.* 63. *b. Herlakenden*'s *case. Landlord*'s *Law pa.* 158. 278. 286. *Fitzherbert*'s *Natura Brevium, Waste*, 132. 1*st Edition. Kelw.* 87.

It is also agreed, that where the *law* creates a duty or charge, and the party is disabled to perform it without any *default* in him, and hath no *remedy over*, there he shall be excused. As in the cases of waste against tenants in dower, by the curtesy, for life, or years, of common carriers innkeepers, &c. of lessees

1787. by parol, &c. or of a *cesser* during a war. *Aleyn* 27. 4 *Co.* 84 *b. Southcote's case*, 2 *Leon.* 189. and other books.

But, it is contended for the Plaintiff, that the Defendant is obliged to pay the rent, and yield up the tenements in good order and repair, because of the *express* covenant: and in support of this doctrine have been cited, *Doctor and Student, Dialogue* 2. *chap.* 4. *pa.* 124. *Aleyn* 27. *Stiles* 47. *S. C.* 1 *Rolls Abr.* 939. *S. C. Comyns Rep.* 631. 632. 2 *Stra.* 763. 1 *Vent.* 185. *Plowd.* 290. *Perkins* 738. *Brook. title (Covenant) pl.* 4. *title, Waste, pl.* 19. 31. 2 *Leon.* 189. *Dyer* 33. *pl.* 10. *Saunders* 420. 2 *Vern.* 280.

On the part of the Defendant, it is insisted, that the express covenant in this case does not bind against acts of God or enemies, but only against all other events; because such acts were not in the *contemplation* of either party at the time of the lease executed. A risque *known and insured* ought to be complied with, agreeably to the bargain, but not otherwise. Every contract ought to be construed according to the *intention* of the parties; and, in the present case, the Defendant had only covenanted to keep the premises in repair, &c. against ordinary accidents, and not against a case, which he could by no possibility prevent. That if the law were otherwise, yet in *England* relief would be had in a Court of Chancery; and that as no such action had ever been brought, in a case circumstanced as this is, an argument is furnished, that no such action will lie. In maintenance of this opinion were cited: *Ld. Raym.* 909. 4 *Bac. Abr.* 369. 370. 1 *Rolls Abr.* 236. *Dyer* 56. *pl.* 15. 1 *Blackst.* 252. 268. 2 *Blackst.* 379. 3 *Blackst.* 153. 157. *Cowper* 9. 600. *Douglass* 190. 1 *Comyns Digest.* 150. *Co. Lit.* 206. 1 *Brown's Parl. Cases* 526. 528. 15 *Vin. Abr.* 474. *pl.* 1. 3 *Chan. Rep.* 44. 79. 3 *Burr.* 1240. 1637. *Dyer* 33. 10. *Sir Tho. Raymond* 464. 1 *Co.* 98. *Shelly's Case.* 6 *Vin. pa.* 407. *ca.* 1. 3. 1 *Cha. Ca.* 72. 83. 84. 190.

The books have been thoroughly searched on this head, and the question discussed with great ability on both sides. In short, little more could be done or said for either party than what has been said and done.

In deciding this intricate and difficult case, it will be of use to state the different powers of the common law Courts, and the Court of Chancery, in *England*, at the time of the revolution.

The Courts of law there are governed by *general and established rules*, from which they never deviate in any case, be the injustice arising from them ever so apparent; for, they are bound by their oaths to observe the *strict rules of law*. A Court of Chancery judges of every case according to the *peculiar circumstances* attending it, and is bound not to suffer an act of injustice to prevail; and in doing this, it conforms to the *spirit and intent* of the general rule of every positive law, which always admits of particular exceptions tacitly understood. The jurisdiction and bounds of these two courts are *fixed*.

In this State, the Judges are sworn "to do equal right and justice to all men, to the best of their judgment and abilities, according to law." There is no Court of Chancery. The Judges here are, therefore, to determine causes according to equity as well as the positive law; equity being a part of the law. *Doctor and Student, lib.* 1. *cha.* 16. 1 *Chan. Cases* 141. *Grounds of Law and Equity* 74. *ca.* 104. Indeed the *common law* is *common right, common reason*, or *common justice*. *Wood's Inst.* 4. 1787.

Were this point brought before a Court of common law in *England* at this day, I have doubts with respect to what would be the determination. For, it is laid down as law, "that if a lessee *covenanteth* to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are overturned by tempest, he is discharged of his *covenant*, *quia impotentia excusat legem*." 1 *Co.* 98. *b.* In that case, there was an *express* covenant; and although it was impossible to restore the trees in the same plight they were, yet he might plant new ones, or render damages in lieu of them. The same law in *Brook. Covenant*, *pl.* 4. Now, was it not equally impossible for the Defendant to deliver the possession of the premises in good repair to the Plaintiffs on the 1st of *March* 1778, when they were held by an hostile army?

In *Vaughan*'s reports, in the case of *Hayes* v. *Bickerstaff*, *pa.* 122. it is held, "that a man's covenant shall not be strained so as to be unreasonable, or that it was improbable to be so intended, without *necessary words* to make it such; for it is unreasonable to suppose a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing." This was an action brought by the lessee against the lessor, on his covenant for quiet enjoyment. In *pa.* 119. it is said, that if the lessor covenants that the lessee shall hold and enjoy his term, without the entry or interruption of any, whether such entry or interruption be *lawful* or *tortious*, there the lessor should be charged, because *no other meaning* can be given to his covenant. In the case before the Court, if the lessee had covenanted for himself and his assigns, to deliver up the tenements in good order and repair, notwithstanding they should be destroyed by *act of God or of an enemy*, then this action would certainly lie, because of the *special express words;* but when there are no such words, but only *generally* to repair, &c. would it be reasonable to construe these words so as to extend to the cases put? Cannot the covenant in this case have another meaning? Can it not be so construed, that the tenements should be kept in good repair, and in such order delivered up at the end of the term, without any act or default in him, or act of any person, who could be prosecuted as a wrong doer, to prevent it; and notwithstanding common and ordinary accidents might happen?

Perhaps, however, the common law courts in *England* might think, that they were bound by the strict rules of law, on account of the *general express* covenant, to determine against the De-

1787. fendant, and that his relief must be in chancery, if any where, because of the established rules and boundaries of the jurisdiction of these courts. We must then consider the equity of this case, and determine upon all the circumstances thereof; for although we have not the chancery forms or methods of carrying several equitable cases into execution, yet we are to determine, where we may, according to equity, as making a part of the law, to prevent a failure of justice. And here we have no precedents in chancery in *point*, but the case of the office, which was taken away by the usurpers in the civil war in *England*, reported in 1 *Ch. Cas.* 72. that of the rent of a house, which was seized by the Parliament, during the said war, for an hospital for soldiers, *Ibid.* 84, which appears to have been taken under advisement by the Chancellor, with a declaration, that, if he could, he would relieve the tenant; but it was afterwards probably compromised, as we can find no more of it: that of the recognizance for payment of £.10,000. to legatees by an executor, where the testator's estate was so lessened by the fire of *London* that it became insufficient to make up the sum. *Ibid.* 190: And that of the fee given with an apprentice; where £.120. was given, and it was provided by *articles expressly*, that if the master died within a year £.60. were to be returned; he died in three weeks after the execution of the articles; and though the parties themselves had provided against accidents, and though the maxim, "*modis et conventio vincunt legem*" was urged, yet an hundred guineas were decreed to be paid back. 1 *Vern.* 460. I say these cases, and the uncontradicted assertion of *Dunning*, that the case of *Paradine* v. *Jane*, and the other cases which went upon the like principles, had been lately over-ruled in chancery, see 3 *Burr.* 1639. and also some others, which have been quoted by the Defendant's Council, hold a doctrine that is strongly in favour of the Defendant.

In *Doctor and Student*, *Dialogue* 2. *ch.* 4. *pa.* 126. Mr. *St. German* is puzzled to give a satisfactory reason to the question put by the Doctor, to wit, "If a man under age marries, and lands afterwards descend to the wife, and waste is committed therein after her death without the concurrence or default of the husband, shall he be charged with it?" The case, thus stated, shews, that he could not refuse taking such estate, and, therefore, the charge or condition annexed to it by law is unreasonable and unjust. He makes the Student answer it in this manner:—"That there is as great default in him as in him in the reversion; and that there is as great reason why he should be charged with the waste, as that he in reversion should be disherited, and have no manner of remedy, nor yet no profit of the land, as the other hath." But I conceive that as there was no default in either of them, nor remedy over for either of them, that there is more reason, that each of them should bear his own share of the loss according to the duration of his estate, than that the one should be responsible to the other. The maxims, "*Lex non cogit impossibilia.*" "*Impotentia excusat legem.*" "Constructions are to be with equity

and moderation, to moderate the rigor of the law." *Grounds, &c.* 38. *ca.* 49. apply to the present case. 1787.

If a lessor covenants that the lessee shall quietly enjoy *against all men*, yet in case he is ousted by an *enemy*, or *tortiously* entered upon by strangers, no action of covenant can be maintained against the lessor, notwithstanding the *express general covenant*. For the enemy he could not oppose, and against strangers he had a remedy over. *Vaughan* 119, *&c.* This the Council for the Plaintiff agree to be the law. Why then should the law make the lessee answerable on such a *general express covenant* to surrender the demised premises in good repair, when they were destroyed by an hostile army? Ought not the two covenants to receive the like favourable and reasonable construction? "Remedies are to be reciprocal." "When the construction of any thing is left to the law, the law, which abhorreth injury and wrong, will never so construe it, as it shall work a wrong." *Grounds, &c.* 368.

To conclude:—Our opinion is, that the Defendant ought to pay the rent; 1st, Because of the express covenant to pay it. 2dly, Because it is a sum *certain*, and the extent of the loss known; and as he was to have the advantage of casual profits, he ought to run the hazard of casual losses during the term, and not lay the whole burthen of them upon the lessors; as resolved in *Aleyn* 27. And 3dly, Because if a tenant by *elegit* be interrupted to take the profits of the land, by reason of *war*, he shall not hold over, but shall sustain the disadvantage, as resolved in 4 *Co.* 81. *b. Sir Andrew Corbit's case.*

But, I am of opinion, that the Defendant is excused from his covenant to deliver up the premises in good repair on the 1st of *March* 1778;—1*st*, Because a covenant to do this, against an act of God or an enemy, ought to be *special and express*, and so clear that no other meaning could be put upon it. 2*dly*, Because the Defendant had no consideration, no premium for this risque, and it was not in the contemplation of either party. And, *lastly*, Because equality is equity, and the loss should be divided;—he who had the *term* will lose the *temporary* profits of the premises, and he, who hath the reversion, will bear the loss done to the *permanent* buildings. Neither party has been guilty of any default; the injury has been done by a common enemy, whom both together could not possibly resist or prevent, and the premises would have been thus damnified in the possession of the Plaintiff himself. Suppose, when the lease was executed, that the lessee had been asked,—Is it your meaning, that, in case the buildings shall be destroyed by an act of God, or public enemies, you are to rebuild or repair them? His answer would have been unquestionably, "No; I never entertained such an idea." Should the like question have been put to the lessor, his answer would certainly have been, "No, I do not expect any thing so unreasonable."

If there is no case in point in favour of this determination, there is none against it; and since no action of this kind has hitherto

1787. been brought, a presumption arises, that the sense of mankind is against it. If, however, we should be thought to be mistaken, another hearing may be had before the High Court of Errors and Appeals, on a writ of error, where this new case may be finally settled.*

MUSGROVE, *qui tam*, &c. *v.* GIBBS.

THIS was an action *qui tam*, &c. on the act of Assembly against Usury; and, in the course of the trial, THE COURT resolved the following points:

First.—*Richardson*, through the mediation of *Shoemaker*, borrowed 800 *Dollars* of the Defendant, and gave his note for 840 *Dollars* payable in one month. There was no talk about premium at the time of the loan; but it was understood by the witnesses, that the borrower was to pay at the rate of *5 per cent. per month* for the money. At the end of the month, *Richardson* paid £. 168. on account of his note, and gave a new note, drawn in favour of, and indorsed by, *Shoemaker*, for the balance. He discharged the amount of this last note at different times; but it was never given up by the Defendant.

RESOLVED, that this was an illegal loaning of money, not the purchase of a note, so as to avoid the penalties of the act; and that the usury was complete on taking and receiving the £. 168; as a proportion of that sum, went towards payment of the illegal interest included in the original note.

Second.—The usurious contract was stated in several counts of the declaration, to be with *Shoemaker* and *Shirtliffe* (who were partners) *jointly;* but the proof was of a note given by *Shoemaker alone.*

RESOLVED, that this variance is fatal: For, an action upon the note could only be maintained against *Shoemaker*, who, if he intended to bind his partner, ought to have used the firm of the company; and, besides, if there should be a recovery against the Defendant on the present count, it would be no bar to another *qui tam* action on the same note, stating the usurious contract to have been with *Shoemaker* alone.

Third.—*Shoemaker* and *Shirtliffe* borrowed several sums from the Defendant, and gave their notes payable in a month, with interest, at the rate of *5 per cent. per month*, added to the principal. When these became due, they could not pay the money, but drew new notes, making the principal and interest of the former notes (which were given up by the Defendant) principal, and again adding the same excessive interest upon the aggregate amount.

RESOLVED, that, although no money was actually paid to the Defendant, the second notes were a satisfaction of the first; and

* The parties, acquiescing in the decision of the Court, no writ of error has been sued out.

the usury was complete on the Defendant's accepting them, as thereby the original contract between the parties was extinguished. And by M'KEAN, *Chief Justice*.—It is well established, that the receipt of one thing in satisfaction of another, is a good payment; as the acceptance of a horse in lieu of a sum of money, or of a bond by a third person in discharge of a prior obligation. 1787.

Fourth.—THE COURT left it to the Jury to determine whether, on certain facts, the Defendant had loaned the money, or purchased the note in question: For, they RESOLVED, that a fair purchase might be made of a bond or note, even at 20 or 30 *per cent.* discount, without incurring the dangers of usury; and, if, upon the present occasion the Defendant had run the risque of a forgery, the presumption ought to operate in her favour, that, for this reason, she had bought the note at a depreciated price.

Sergeant and *Bradford*, for the Plaintiff.—*Lewis*, *Ingersol* and *Dallas*, for the Defendant.

Common Pleas,

PHILADELPHIA COUNTY.

September Term, 1787.

DOANE's Administrators *v.* PENHALLOW *et al.*

THIS was a foreign attachment, in which, and in two others against the same Defendants for the same cause, a motion was made to quash the writs. After argument, THE PRESIDENT recapitulated the grounds of the motion, and delivered the opinion of the Court as follows:

SHIPPEN, *President*.—On the hearing of this motion the Plaintiffs were called upon to shew their cause of action: They shew that on the 17th of *September* 1783, a certain cause, wherein *Elisha Doane* was claimant and appellant, against the brigantine *Susannah* and her cargo, and *John Penhallow* and others libellants and appellees, was tried in the Court of Appeals in cases of capture established by Congress in the city of *Philadelphia*. And that it was there finally adjudged and decreed by the said Court of Appeals, that the sentence or decree, given by the inferior and superior Courts of Judicature in the State of *New-Hampshire* in the said cause, should be revoked and annulled, and the property specified in the said claim should be restored to the claimant. The Plaintiffs further shew, by depositions, that notwithstanding this final decree of reversal, the Defendants, although requested, had refused, and still refuse, to restore the property specified in the claim of the said *Elisha Doane*, the said Defendants being owners and agents of the privateer *M'Clary*, which captured the said brigantine *Susannah* and her cargo, but had converted and disposed of the same to their own use. Upon this ground the action is brought to recover the value of the said

brig and cargo against the Defendants. Two other actions are brought by *Isaiah Doane* and *James Sheppard* against the same Defendants for the same cause. 1787.

The motion to dissolve these attachments is founded on a rule and practice of this Court, that in cases of foreign attachments, they will examine into the Plaintiff's cause of action, and if they find it not to be such as would entitle him to hold the Defendants to special bail, they will dissolve the attachment. This rule was founded on the mischiefs which were found to arise from groundless attachments of the ships and property of persons not inhabitants or resident within this State, and is conformable to the spirit of the attachment law.

The Council for the Defendants, in order to shew that there are not sufficient grounds to hold the Defendants to bail, have produced evidence of an original condemnation of the brig and her cargo as lawful prize in the maritime Court of *New-Hampshire*, on the 16th day of *December* 1777, agreeably to an act of Assembly of that State; and also a similar condemnation in the Superior Court of Judicature of that State, on an appeal from that maritime Court, with an order for sale and distribution of the property among the captors, and an actual sale and distribution accordingly. And they urge, that the subsequent reversal of those sentences, five or six years afterwards, by the commissioners of Congress appointed for hearing appeals in cases of prize, is null and void, and insufficient to revest the property in the claimants, Congress having had no power, before the articles of Confederation, to receive appeals in case of prize. They also urge that a prior action has been brought by the present Plaintiffs against the Defendants in the State of *Massachusetts*, for the same cause; and that on the trial of that action, the judges there determined, that the decree of reversal should not be given in evidence to the jury; and that the Plaintiffs, in order to avoid a verdict against them, had prayed and obtained leave to discontinue that action. And that, therefore, the present action is vexatious, and the Defendants should not be held to bail.

A third reason is also urged by the Defendants Council, that this being originally a cause of prize, it is exclusively of Admiralty jurisdiction; and that no action will lie at common law, either for the original taking, or any of the consequences.

The Court have heard, and deliberately considered, the several arguments on these points, delivered by learned council on both sides.

The first point involves in it the sovereign rights of the separate States on the one hand, and the supreme power of the United States in Congress assembled on the other; and is, indeed, a momentous question; which, however, we shall shew in the decision of the third point, to be unnecessary, and, perhaps, improper for us to decide upon.

On the second point, it is proper to declare, that we think ourselves indispensably bound to give full faith and credit to the legal acts of our Sister States; and that the judgments given in

1787. their Courts will have their full effect here. But it is not every discontinuance that will disable a Plaintiff to hold a Defendant to bail in a second action; *that* will depend upon the circumstances of vexation attending the case; which we, likewise, think it unnecessary to discuss, in the present case, as we are clear and unanimous upon the last point.

The whole learning upon this subject is collected together and drawn to a point, in the famous case of *Le Caux* v. *Eden*, reported in *Douglas* 572. By this case, and the cases cited by the judges in support of their opinion, it appears clearly;—1st, That the question of prize, or no prize, is solely and exclusively of Admiralty jurisdiction, and not triable at common law. 2dly, That not only the original taking, but all the consequences are solely appropriated to the Admiralty. 3dly, That, although there may have been a definitive sentence of acquittal in the Admiralty, and *that sentence* conclusive on the question, yet for any matter happening consequential to the taking *as prize*, no suit will lie at common law; and that in all those consequential cases, notwithstanding the sentence of acquittal, the question of prize or no prize must still arise, and the sentence is evidence of a thing which the common law cannot enquire into.

The application of these cases to the cause before us, is evident and obvious. The original taking of the *Susanna* and her cargo, was by a commissioned privateer *as prize;* the carrying her into port, the procuring her condemnation in the maritime Court of *New-Hampshire*, and the sale and distribution by order of that Court, were all consequences of this *taking as prize*. And, notwithstanding the sentence of reversal and acquittal, the question of prize or no prize will still occur.

The answer given by the Plaintiff's Council to the cases cited in *Douglas*, is, that in all those cases the facts on which the actions were founded, happened *previous* to the decision of the question of prize; but that in these actions the facts which support them occurred *after* the final sentence of acquittal, when the cause was at rest, and it was no longer necessary to examine the question of prize; *which facts* were, that after the final sentence of reversal the Defendants were requested and refused to restore the property agreeably to the sentence, and converted it to their own use, which is the ground of the action. The distinction itself does not appear from the cases, to be well founded, as it is not the *time when* the facts happened, but the connection they have with the original capture, and their being the necessary consequences of the capture, that gives the exclusive jurisdiction to the Admiralty. In the case of *Ridly* v. *Egglesfield* in 2 *Lev.* 25, there had been a previous condemnation of the ship and goods as prize in *Scotland*, and two subsequent sales on land, one in *Scotland* and the other in *England;* under which last sale one of the parties claimed; yet the Court say that this does not alter the case, being matters consequential upon the original taking,

and dependant upon it. And, it is observable, that in this very case, as it is reported in 2 *Strind.* 259. the Court say that the *validity* of the sentence in the Admiralty Court in *Scotland* was determinable by the law of the Admiralty of *England, and not by the common law.* If, however, the distinction made by the Plaintiffs Council was even admitted to be well founded, do the facts on which these actions must be supported, appear to be subsequent to the final acquittal? It is true, there was a demand and refusal subsequent to that decree, but a demand and refusal is only *evidence* of a conversion, and not the conversion itself. Are we to shut our eyes against the other evidence, and not see *when* the conversion was made? It appears to have originated on the taking the vessel as prize on the high seas, and it was completed on the sale and distribution of the money in pursuance of the decree of the Superior Court of *New-Hampshire*, in consequence of the taking as prize:—All this long before the reversal of the decree. 1787.

What is this, then, but an action to enforce by our authority, the decree of the Court of Appeals? Are we authorized to enforce that decree? Is there any case whatever which shews that an action will lie at common law, to carry into execution the decree of a prize court of Admiralty? The jurisdictions of the two courts are intirely separate, and they judge by different laws. It is true, that in some cases the courts of common law and the *Instance Court* of Admiralty, have concurrent jurisdictions, as in suits for seamen's wages; but in no case whatever have the *Prize Courts* of Admiralty and the common law courts a concurrent jurisdiction.

I have said before that the question of prize would still occur in this action; the ultimate fact disputed, is, whether the vessel and cargo were prize or not: the evidence to support or contradict this fact arises, on one side, from the sentences of the maritime courts of *New-Hampshire;* on the other from the sentence of the court of appeals of Congress. The validity of the latter sentence is disputed; if we say it is valid, we in effect say she is no *prize*, if otherwise, we say she *was a prize.* We have clearly no authority to say either one or the other. By the case in *Saunders*, we cannot determine upon the validity of the sentence itself; and if we could, yet it is, as justice *Buller* observes in *Douglas*, evidence of a thing which a common law court has no right to enquire into.

Upon the whole, therefore, as the question to be tried in this action, if not directly a question of prize, is yet a question arising upon the immediate and necessary consequences of the vessel's being taken *as prize*, which is solely and exclusively of Admiralty jurisdiction; and as it is an action to carry into execution the sentence of the court of appeals, which we have no authority to do (*that* being the proper judicature to carry into effect its own sentences) we think the present action will not lie, and adjudge that the attachments be dissolved.*

*See 2 *Dall. Rep* 160. *Ibid.* 174. 3 *Dall. Rep.* 19. 54.

1787.

EASTWICK *v.* HUGG.

THIS was an action for money had and received, &c. The Defendant, being Sheriff of *Gloucester* county in *New Jersey*, received a sum of money for the Plaintiff, which he lent, with her consent, upon a mortgage of lands in that State. The mortgagor, from time to time, paid the interest to *Hugg*, and, finally, in the year 1778, paid the whole principal and interest to him in depreciated paper money. It did not appear that *Hugg* had any express authority from the Plaintiff to recieve this payment of the principal from the mortgagor, and she afterwards refused to accept the Continental money, insisting that she was entitled to recover the full sum in specie; for which, accordingly, the present action was brought. Upon the trial of the cause, the Court, in their charge, left it to the Jury, to give such damages as they thought just; whereupon a verdict was returned for the Plaintiff, for the full amount received by the Defendant (£ 27. 10.) in hard money; and *Lewis*, upon the ground of misdirection moved, for a new trial.

In support of this motion, two points were made for the Defendant:—1*st*, That in an action for money had and received, the Plaintiff waves all tort, admits the right to receive, and, therefore, can recover no more than has actually come to the Defendant's hands. 2 *Burr.* 1003. *Cowp.* 416. 419. *Ibid.* 199. *Bull. N. P.* 128. 2*dly*, That the Defendant, in this case, held the money as trustee for the Plaintiff, and ought, therefore, to be discharged from any payment, except in the identical paper money which he had received. 2 *Penn. Laws*, 495.

Sergeant, for the Plaintiff, urged that the Court would not grant a new trial where the object was so inconsiderable; nor merely for a mistake in the form of the action, if the justice of the cause was with the Plaintiff. 2 *Burr.* 936. *Cowp.* 601. 2 *Burr.* 604. 5. And, he insisted, that the Jury had a right to estimate the damages. 10 *Mod.* 19. 1 *Ld. Raym.* 1000.

THE PRESIDENT, after consideration, stated the circumstances of the case, and delivered the opinion of the Court, in the following manner:

SHIPPEN, *President*.—The facts were shortly these:—The Defendant, then Sheriff of *Gloucester* county in *New-Jersey*, having in his hands a sum of money belonging to the Plaintiff, who resided in the city of *Philadelphia*, in the year 1772, with the consent of the Plaintiff, lent it to one of his neighbours in *New-Jersey* at seven *per cent.* interest. A bond and mortgage was taken for it in the name of the Plaintiff, which were left in the Defendant's hands for the purpose of receiving the money when it

should become due, for the use of the Plaintiff. The obligor, whose name was *White*, paid interest at different times to the Defendant, who paid it over to the Plaintiff. In the month of *November*, 1778, the Defendant received the whole principal and interest then due *in Continental Money*, and delivered up the bond and mortgage to the debtor.—It appeared by the testimony of *White* that when he paid the money to *Hugg* he did not mean to make a legal tender of it, although he brought a witness to be present at the payment, which was done, as he said, only because he himself did not well understand the *English* language. *Hugg* not having paid the money to the Plaintiff, she brings this action against him for money had and received to her use. 1787.

On the part of the Plaintiff it was contended on the trial, that the Defendant not having been compelled to receive the *Continental Money*, received it in his own wrong, and ought to answer the full sum *in hard Money* to the Plaintiff.

On the part of the Defendant, it was urged, that the Defendant being authorized to receive the money, had received it properly, in the then current money, made a legal tender by law, and could be answerable for no more than he had actually received.

The Court left it to the Jury to consider the justice and equity of the case, but hinted their opinion, that, considering the circumstances of the times, it might be most reasonable and just to settle the sum according to the scale of depreciation. At the same time telling them that this action was in the nature of a bill in equity, and that they might give such a sum in damages as they thought just. The Jury found a verdict for the Plaintiff for the sum received in *hard Money*. A motion was then made for a new trial on the ground of misdirection.

Having had time to deliberate and consider the law arising on this case, we are of opinion, that the Court ought not to have left it to the Jury to give in damages more than was actually received.

The action of *assumpsit* for money had and received, has been of late considered to be of so liberal a nature, that it is not to be wondered at, that on a sudden its extent should be mistaken. It is a very beneficial action, not only for the Plaintiff, but the Defendant; yet, it has its limits. It is beneficial to the *Plaintiff*, because, when he has another remedy as well as this, he may elect this, and is under no necessity to state the special circumstances of his case, but may make it out by evidence on the trial. For the *Defendant*, it is beneficial, because, as Lord *Mansfield* says, *he can be liable for no further than for the money he has received*, and against *that* may go into every equitable defence upon the general issue. It is in fact an action to oblige the Defendant to *refund* what he has received; and the word *refund ex vi termini*, precludes the idea of his being answerable for more than he has actually received. Interest, indeed, may be added as damages for the detention, but no more. In this kind of action the Plaintiff waves all torts and special damages; and goes

1787. only for the money received; and so far confirms the Defendant's act, as that he cannot gainsay his right to receive it.

As to the *justice* of the verdict, it is not so very apparent as to make us anxious to support it, against the rules of law: Col. *Hugg* was the Plaintiff's agent in this matter, without any reward. He was an Officer in the *American* army, and probably thought the support of the war depended on the support of the credit of the Continental money; it was the only money then in circulation; and though it had depreciated five or six for one, he might reasonably think it would not only be injurious to his own reputation, but to the common cause, to refuse it. All these circumstances must have been known to the Plaintiff, and yet she suffers the bond and mortgage to remain in his hands. She might have taken the securities from him, and abided by the consequences of refusing it herself. The debtor, *White*, it is true, swore he did not mean to force the money upon *Hugg*; but it is as true, that when he brought the Continental money to discharge the debt, he brought a *witness* with him, which he had not done before when he paid the interest in hard money. This circumstance might reasonably induce a belief in *Hugg* that he meant to make a legal tender of the money; and *White*, notwithstanding what he says, might possibly have availed himself of it as a legal tender, in case *Hugg* had refused the money.

For these reasons, I say, the justice of the verdict may be well questioned; yet if the case had been before the Jury in such a way as that they could legally have given damages according to their discretion, perhaps, we should not have thought it proper to set aside their verdict, on account of their having, in a doubtful case, exercised their judgment, and drawn different conclusions from the facts. However as the law is clear, that in this kind of action, the Defendant is liable for no more than he has received, we must order a new trial.*

* On the second trial of this cause, the 14th of *May* 1788, *Levy* called the Defendant as a witness, to prove that the continental bills of credit, which he produced in Court, were the identical bills he received from *White*, in satisfaction of the mortgage. But *Sergeant* objected, that *Hugg* was not an agent within the meaning of the act of Assembly, but merely a person who had officiously received the monies of another.

The Court rejected the witness. And Shippen, *President*, observed, that *Hugg* appeared to have been an agent to receive the *interest*; but, it was evident, that he doubted in his own mind, whether his authority extended any farther; for, it is in proof, that when he was tendered the *principal*, he referred the mortgagor to the Plaintiff herself, who resided in *Pennsylvania*. There must be some satisfactory proof of his being actually an agent, before the Court can allow a party to be sworn, under the act of Assembly, to identify the money in dispute.

By the verdict of the second Jury, it appears, that they reduced the money according to the scale of depreciation, and added the interest.

1787.

KUHN *v.* PRIMER.

THE Plaintiff had become bound to one *Splecit* in the payment of a certain sum of money; and, after the bond was due, he obtained a discharge under the insolvent laws. Subsequent to his discharge, the Defendant bought sundry goods of him, and when the price was demanded, tendered *Splecit*'s bond in payment, an assignment of which he had purchased for that purpose. The Plaintiff, refusing to accept it, brought this action, and on the trial, the Defendant offered to give the bond in evidence, by way of sett off; in consequence of which the balance would have been turned in his favour.

Sergeant, for the Plaintiff, opposed the admission of the bond in evidence, and cited *Bull. L. N. P.* 179.

Levy contended that the evidence ought to be allowed, and referred to the same book, page 170.

BY THE COURT:—The hardship that must attend the admission of the bond, would in reason be alone sufficient to determine us to reject it. An insolvent debtor could never get forward in the world, if his old bonds, and other negotiable papers, were thus capable of being put in force against him. A debt of £. 50 might be bought for 50*s.* and the debtor, after his discharge, be liable, by such negotiations, to be defeated in every action, and baffled in every contract.

But the law is clear, that the assignment being *after the insolvency*, the Defendant can be in no better condition than the assignor, who could only come in for a dividend.*

The evidence was overruled, and *Levy* tendered a bill of exceptions. †

HOCKER *v.* STRICKER, Under Sheriff.

IT was ruled in this case, that before the goods are removed, the Sheriff ought to allow a reasonable time, for the Defendant in *Replevin* to find security on a claim of property; which, in the practice of *Pennsylvania*, supplies the place of a writ *de proprietate probanda:* And SHIPPEN, *President*, said, that if the Jury were of opinion that a reasonable time had been refused, the Defendant, *Stricker*, could not, in an action of trespass, justify under the writ of *Replevin*.‡

* See 2 *Stra.* 1234.

† The case being removed by a writ of error into the *Supreme Court*, the judgment of the Common Pleas was reversed. See *post.*

‡ See ant. 156.

1787.

BUSBY v. BUSBY.

THIS was a case stated for the opinion of the Court. It was argued on the 11th instant by *Sergeant* on the one side; and *Lewis* and *Levy* on the other. This day the President repeated the case, and delivered the opinion of the Court as follows.

SHIPPEN, *President*.—The question arises upon the will of *Thomas Busby*, whether the devise to his wife of a certain piece of land therein mentioned, passes a fee simple, or an estate for life only—There are no words of limitation in the devise; but, it is contended, that in the introductory part of the will, and by the whole will taken together, it was the clear intention of the testator to pass a fee. The intention of the testator is said to be the pole star to guide the construction of wills.—But there are two qualifications to this rule; 1st, That this intention must not clash with the rules of law; and 2dly, That where legal technical terms are wanting, the intention, to supply them, must be clear and manifest from the words and expressions in the will.

The will begins with these words; "And as to what worldly "estate I am blessed with, I dispose of as followeth."—There are three devises which relate to the real estate: *First*, a devise "to his son *Isaac Busby* of the house and plantation where the "testator then dwelt, with all the appurtenances thereunto be-"longing, to have, and to hold unto the said *Isaac Busby* his *heirs* "*and assigns* for ever, he paying his brother ten pounds a year "during his natural life." The *second* devise is to his wife of the land now in dispute, in these words: "I give, devise, and be-"queath, unto my wife *Mary*, a certain piece of land bounding "on *William Busby*, &c. Also I give my said wife one third of "such moveable estate as shall be remaining after the payment of "my debts and funeral expences, and such legacies as are here-"in after given, *which shall be in lieu of her dower or thirds* of my "estate."—He then gives several pecuniary legacies to his seve-ral children, and bequeaths the remaining two thirds of his per-sonal estate to his son *Isaac* and his five sisters, equally to be di-vided between them.—And the *third* and last disposition of his land is a direction, that his house and land by the mill should be sold by his executor.

The word "estate" in a will, connected with a devise, as where a man gives all the residue of his estate, or gives his *es-tate* in such a place, will pass a fee simple without words of inhe-ritance; because it shall be intended that he meant to give the whole estate which he himself had, both as to quantity and quality. The words, "As to all my worldly estate," in the beginning of the will, unconnected with any particular devise, shew an intention to dispose of his whole estate, but will not carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. There are many cases in the law books of wills beginning with these words: I shall content my-

self with animadverting upon only two of them cited, one on one side of the question, and the other, on the other side a, they appear to me to be the most similar to the present case, as to this point. 1787.

The first is the case of *Frogmorton* v. *Holiday* in 1 *Black. Rep.* 535. and 3 *Burr.* 1618.—The will in that case began, as here, "As to all her worldly affairs and estate; it is similar to it likewise in disposing of the residue of her personal estate, and not mentioning the realty, and also in containing a devise of another estate *with* words of inheritance. But there is an ingredient in that case, on which the greatest stress appears to have been laid by the Judges; which was, that, in the devise, the trustee charged the house and garden with the payment of fifty pounds out of the yearly rents and profits; the annual rent was ten pounds a year; the devisee was about seven years old at the death of his mother, and there was a direction that if the devisee should die in *his minority*, then the house and garden should go to the testatrix's three daughters share and share alike.—Here, though the charge *on the profits*, unconnected with other circumstances, would not have passed a fee, yet the Court said this was a middle case, and that the reason why this mode of payment was ordered, was apparently because the devisee was a minor, and the limitation over, if he should die before the age of 21, shewed the testator meant the heir should not have it; for, if the devisee was barely to take an estate for life, the *time* of his death must be *immaterial* to the devise over; but limiting it over, *only* upon the contingency of his dying in his minority, shewed that the testator intended to give him an absolute estate in fee, which he might dispose of when he came of age.—The implication was therefore thought by the Court to be a necessary one, and the other parts of the will assisted the construction.

The case cited on the other side as most material, is the case of *Frogmorton* v. *Wright* in 2 *Blackst. R.* 889.—There the will began, as here, "As to all my temporal estate;" there were no words of inheritance in the particular devise, and there was a disposition of the residue of the personal estate *only*. There the Court said, though the probable intent of the testator was an absolute disposition, yet it is not a *certain intent*, nor is it a legal disposition.—In the report of the same case, in 3 *Wils.* 414, the whole will is set out, and it appears that there were two devises of lands to his different nephews, nearly in the same words, and several pecuniary bequests to his other nephews and nieces. The Chief Justice there says, it may seem probable that the testator's intention was that his nephew *William* should have a fee; but it is a clear rule of law that there must be express words or *a necessary implication* to disinherit the heir at law, and where neither of them appear, the legal operation of the words of the will must govern. In the case first mentioned, in 1 *Blackstone*, the Court say, there *was a necessary implication*, and, therefore, they determined it a fee: In the latter case, there was no necessary implication, therefore, they determined it only an estate for life.

1787. The implications contended for, on the part of the Plaintiff, in this case, do not appear to me to be *necessary* implications; they amount at most to *probable* ones; but we are not warranted n departing from the rules of law by probable conjectures.—And, it may be questioned, whether even these probabilities, are not overbalanced by the presumptions arising from the devise of his house and plantation to his son *Isaac Busby*, in which he carefully and formally inserts an *habendum to him, his heirs and assigns for ever:* And also by his adding to the devise of the land in controversy, that it should be *in lieu of her dower or thirds* of his estate; it being well known in the country that such dower or thirds of land is only during life.

We are, therefore, of opinion that *Mary Busby* took only an estate for life by the devise.

Judgment for the Defandant.

Supreme Court of Pennsylvania:

January Term, 1788.

MILLAR *v.* HALL.

RULE to shew cause why an *Exoneretur* should not be entered on the bail-piece.—The Defendant had obtained his discharge under the insolvent law in the state of *Maryland*, which law was enacted subsequent to the debt in question, and to the institution of this suit. It was stated, and allowed, that the money for which the action was brought, had been paid to *Hall* in *Maryland*, on account of goods sold and delivered upon a commission as the partner of *Millar;* but that the original agreement under which they acted in the sale of those goods was executed in *Philadelphia*, and that the proceeds belonged to merchants residing in *Pennsylvania*, where, consequently, the payment was to be made. It was, likewise, admitted, that the Defendant was resident in, and subject to the laws of *Maryland;* and that the Plaintiff was resident in, and subject to the laws of *Pennsylvania:* And it did not appear to the Court that the Plaintiff was returned as a creditor in the Defendant's schedule; nor was any notice of the time and place of surrender served upon him, though a general publication of the Defendant's intention to take the benefit of the insolvent law, was made, in the usual form, in the *Baltimore Gazette.*

Moylan, in shewing cause against the rule, argued, that according to the strict idea of a municipal law, it was limited in its operation to the jurisdiction of the state that made it; for *jus civile est quod quisque sibi populus constituit;* and to a free people particularly, it must appear unreasonable that there should be legislation where there is no representation. 2 *Inst.* 98. There are, however, he acknowledged, cases in which an indirect effect is

1788. given to foreign statutes in order to accomplish the rules of justice; as in the instance of contracts entered into in other countries, or of bargains which are unlawful where made; or of a certificate obtained under a bankrupt law in a foreign nation, of which both debtor and creditor are members and subjects. *Prin. of Eq.* 363. 1 *Black. Rep.* 234. 256. But still, in all these exceptions, the foreign statutes, *as such*, have no coercive authority *extra territorium*, but are received only by consent as far as they are necessary to justice.

He then contended from the facts, that the Defendant did not come within the principle of any of the cases referred to; for, as the Plaintiff was not a subject of *Maryland*, it cannot be presumed that either by himself or his representatives, he has consented to the Defendant's discharge, or rather to the law, by which that discharge was authorized; that, as between the Plaintiff and Defendant, the place of the contract, which the law materially regards, was *Philadelphia*, where the merchants to whom the money was, in fact, payable, resided; and that even if the contract had been made in *Maryland*, the Defendant would not be in a better condition on that account, as the law under which he was discharged, was enacted several years afterwards, and, therefore, could not have been in the contemplation of the parties in making their agreement.

He urged, likewise, the inconveniences that would attend the adverse doctrine, from a variety of considerations. Suppose there had been no bankrupt law in *Pennsylvania*, and that, in truth, our Legislature disapproved of it, yet, every debtor by going into *Maryland* and complying with the terms of their general act, or, perhaps, by virtue of a special one, might obtain a certificate, which, it is contended, would discharge him from his creditors here; and thus another state would make laws for us, not only without our consent, but contrary to our interior policy. Again, if no other notice is required than an advertisement in a *Maryland* newspaper, which the citizens of *Pennsylvania* seldom read, the spoils may be shared among the creditors present, to the exclusion of the absent; who, at the same time, have been guilty of no fault or negligence, but, if they had been apprized of the transaction, might have suggested such circumstances of fraud, as would prevent the granting the very certificate, which is set up as a conclusive bar to their just demands. In *England* the king is not bound by the bankrupt laws, 1 *Atk.* 303. and shall we be bound, who are not in any degree connected with the government that made them? If *Maryland* had given a preference to her own citizens in the distribution of an insolvent's, or a bankrupt's estate, ought we, who are strangers, to be affected by the certificate of discharge, though we derive no benefit from the surrender of property? Where, or how, is the line to be drawn? If, indeed, the certificate is to be universally operative, so ought the assignment of the bankrupt's estate to be, since the words of the bankrupt laws are, in this respect, as comprehensive and forcible, as in that; and yet it is an established doctrine, that the assignment is only binding in the state in which the commission issues. *Doug.* 160. The act of

Maryland is an insolvent, and not a bankrupt law, as it works no extinguishment of the debt, but leaves all future acquisitions of property liable to the creditors of the person discharged: And in the case of *James et al.* v. *Allen*, *ant.* 188. SHIPPEN, *President*, determined that an insolvent law of *New-Jersey* was local in its terms, and local in its nature. 1788.

Ingersol, in support of the rule, having stated that an *Exoneretur* might be entered without an actual surrender of the principal: *Barn.* 194. 1 *Com. Dig.* 496. and proved that the Defendant had complied with the terms of the insolvent law of *Maryland*, observed, that imprisonment had been thought by very judicious writers, to be an act illegal in itself; *Burgess on Insolv.* and it seems, indeed, that the only reasonable justification of it, is to compel a debtor to surrender all his effects for the benefit of his creditors. When that is done, it is not only unreasonable and unjust, but, by the express provision of *the Const. of Penn.* §. 8. independent of the doctrines founded on the common law, it is illegal to restrain a man's personal freedom.

He then contended, that from general principles, from positive authorities, arising under the bankrupt laws of different countries, from the reason of the thing, and from the mischievous consequences of a contrary position, the discharge of the Defendant in one state, ought to be sufficient to discharge him in every state; without this, perpetual imprisonment must be the lot of every man who fails; and all hope of retrieving his losses by honest and industrious pursuits, will be cut off from the unfortunate bankrupt.

But a debt paid according to the law of a foreign country, though in a depreciated medium, has been decreed to be a satisfaction; and a *cessio bonorum* in *Holland*, which is a discharge there, was decided to have the same effect in *England*. *Co. Bank. Law* 60. 1. 2. 115. 347. *Green Bank. Law* 131. 260. 2 *Stra.* 738. 1 *Atk.* 119. *Brown Cases in Chan.* 376. These authorities apply here with additional force, under the sanction of the articles of Confederation, which declare, that "full faith and credit shall be given "in each of these states to the records, acts, and judicial proceed-"ings of the courts and magistrates of every other state:" "And "also, that the free inhabitants of each of these states shall be "entitled to all privileges and immunities of free citizens in the "several states; and the people of each state shall have free in-"gress and regress to and from any other state." See *Art.* 4.

THE CHIEF JUSTICE, after consideration, delivered the opinion of the Court.

M'KEAN, *Chief Justice*.—This comes before the Court on a motion for leave to enter an *Exoneretur* on the bail-piece, upon this principle, that the Defendant has been discharged under an insolvent law of the state of *Maryland*, which is in the nature of a general bankrupt-law. To this it has been objected, that the insolvent law by which the Defendant has been discharged, was made pending the action, and therefore ought not to operate in the

1788. present case, even if the laws of any particular country could be extended beyond the jurisdiction of that country, which has likewise been denied; and, it is said, that in order to give a binding force to laws, it is necessary that the person to be affected should have consented to them either by himself, or his representatives.

But, having considered the principles of the law of nations, and the reciprocal obligation of the states under the articles of Confederation, we are of opinion, that the act of Assembly by which the Defendant has been discharged, must be considered as a general bankrupt-law, made for general purposes, and equally advantageous to all his creditors. To execute, therefore, upon his person out of the state in which he has been discharged, would be giving a superiority to some creditors, and affording them a double satisfaction—to wit, a proportionable dividend of his property there, and the imprisonment of his person here.—It is true, that the laws of a particular country, have *in themselves* no extra-territorial force, no coercive operation; but by the consent of nations, they acquire an influence and obligation, and, in many instances, become conclusive throughout the world. Acts of pardon, marriage, and divorce, made in one country, are received and binding in all countries. In the state of *Delaware* there is a law, a narrow and contracted one indeed, which obliges executors or administrators to discharge the debts due from the deceased to his creditors *within the state*, in preference to every other. This the executor is obliged to comply with, because he is immediately under the coercion of the law which prescribes it; so that the distribution thus made, is certainly binding out of the state, and the law is in that respect every where recived; for, it would be more unjust to compel the executor who acted legally in his own state, to pay the money out of his pocket, than that the creditor should lose the amount of his demand.

With respect to the argument, that no person can be bound by laws to which he has not either directly or virtually consented, it must be observed that, though Mr. *Millar*, the Plaintiff, was not a citizen of *Maryland*, yet Mr. *Hall* was; and he by the law in question, has been obliged to transfer all his effects for the benefit of all his creditors. Having done this, we must presume that he has fairly done it, and therefore to permit the taking his person here, would be to attempt to compel him to perform an impossibility, that is, to pay a debt after he has been deprived of every means of payment,—an attempt which would, at least, amount to perpetual imprisonment, unless the benevolence of his friends should interfere to discharge the Plaintiff's account.

From the nature of the act then, it appears to be founded upon equitable grounds, for general and just purposes; it ought therefore to be regarded in all other countries, and should enjoy that weight, in our decisions, which it naturally derives from general conveniency, expediency, justice, and humanity. For, mutual conveniency, policy, the consent of nations, and the general princi-

ples of justice form a code which pervades all nations, and must be every where acknowledged and pursued. 1788.

Upon the whole, it is clear, that this transaction does not arise *in frandem legis*, and that extending the law of *Maryland* to its present object, will be in no degree derogatory to the independence and sovereignty of this state:—Therefore, let the *exoneretur* be entered.*

RESPUBLICA *v.* GORDON.

THE Defendant was included in an act of proclamation issued during the late war, and not appearing within the time prescribed, was attainted of treason for adhering to the king of *Great Britain*, in consequence of which his estate was confiscated to the use of the commonwealth, but it had never been taken into possession.

He returned, since the peace, to the state of *Pennsylvania*, and applied to the executive council, representing that he was a minor at the time of the attainder, and was forcibly prevented by his guardian from joining the American army;—for which reasons he prayed a restoration of his estate. The Council said, they were ready to grant him a pardon, but that they had it not in their power to restore his estate, which was a matter of legislative jurisdiction. Mr. *Gordon*, therefore, addressed several members of the general assembly, but he was there answered, that the executive council, or the supreme court of justice, was the proper tribunal to hear and determine the merits of his case. The Defendant, by the advice of his Council, again applied to the executive power, and requested, that, to bring the matter before the judges, the attorney-general might be directed to file a suggestion in the supreme court, of the Defendant's being attainted in the manner above-mentioned.

This being done accordingly, Mr. *Gordon* gave bail for his appearance, and two pleas, 1st. infancy, and 2dly. duress, were filed, to the suggestion thus made, on the behalf of the commonwealth;—to the former of these, the attorney-general demurred, and joined issue on the latter.

But now THE CHIEF JUSTICE delivered the opinion of the Court, that any proceedings against Mr. *Gordon*, the Defendant, would contravene an express article in the treaty of peace and amity, entered into, between the United States of *America* and *Great Britain*, for which reason they could not sustain the suggestion filed by the attorney-general. And the Defendant was accordingly discharged.†

* See *post* 294. *Thompson* v. *Young*. *H* 366. *Gorgerat et al. M'Carty*, 2 *Dall. Rep.* 100. 256. 3 *Dall. Rep* 369. See also 1 *East. Rep.* 6. 2 *H. Black.* 553.

† The object that the Defendant meant to accomplish by this proceeding, was to reverse the attainder; in consequence of which his title to the estate would revive, and, as it had not been appropriated or disposed of by the Commonwealth, there would then be no obstacle to his taking immediate possession. The Legislature soon afterwards passed an act in favour of Mr. *Gordon*'s pretensions. See 3 *Dall. Rep.* 1. *Ibid.* 199. *Ibid.* 305. *in note.*

1788.

STEINMETZ *et al.* v. CURREY.

MOTION for a new trial. The circumstances of the case were these:—*James Whitelaw* drew a bill of exchange, dated the 30th of *October* 1775, for £. 239 18 0 sterling, upon *William Houston* and *Co.* in *Refrew* near *Glasgow*, payable on the 1st of *August*, 1776, in favour of *John Witherspoon*, or order; which bill was afterwards indorsed by the said *John Witherspoon*, by *Archibald Currey* (the Defendant) by *Archibald* and *Wm. Blair*, by *John Pringle*, by *Steinmetz* and *Bell*, (the Plaintiffs) by *Mark Freeman* and by *William Cowpland*. The Defendant's indorsement was made on or about, the 17th of *April* 1777, and the bill was presented and protested for non-acceptance on the 30th of *December* 1778; of which notice was given on the 28th of *April* 1780, to the Plaintiffs, who *on the 9th of November following*, paid the amount, and giving notice thereof to the Defendant *on the 17th of October* 1782, they commenced the present action on the succeeding day.

Upon the trial, the Court was moved to direct the Jury to find a special verdict; but, perceiving so great a complication of fact and law in the case; and, being doubtful, as the whole transaction happened *flagrante bello*, whether the point of reasonable notice of the protest, was proper for them, or the Jury, to determine, it was thought best, upon the whole, to leave it to the Jury to find either a special, or a general verdict, as they should think advisable. The Jury found a general verdict for the Plaintiff.

The motion for a new trial was made, and argued, at the last term; and now the CHIEF JUSTICE, having recapitulated the preceding state of the case, delivered the opinion of the Court.

M'KEAN, *Chief Justice*.—The motion for a new trial in this cause, has been supported on two grounds: 1*st*, Because the Plaintiffs declare on the first bill of exchange, and produce the second and third, with a protest of the second; alleging, that the first was also protested, but furnishing no proof of that fact. And 2*dly*, Because the verdict was against law and evidence.

Granting new trials depends on the *legal discretion* of the Court, guided by the *nature* and *circumstances* of the particular case. 1 *Burr.* 293. The Courts of *England* have granted them where the Jury have found a *general* verdict, after Council have prayed for, and the Court have directed, a *special* one. 8 *Mod.* 220. 1 *Will.* 212. So where the verdict is against the *strength* of the evidence, and the trial is peremptory. 12 *Mod.* 439. 1 *Barn. Notes* 322. 1 *Stra.* 584. 2 *Ld. Raym.* 1358. *S. C.* 1 *Burr.* 395. And where the matter appears to the Court to deserve a *re-examination*, they have likewise frequently ordered a new trial. 12 *Mod.* 336. 347. *Vin. Abr. trial. N. g. f.* 475.

In the present case, the verdict appears to be against the strength of the evidence. Two years and a half (from the 28th of *April*

1780, until the 17th of *October* 1782,) elapsed between the time at which the Plaintiffs had notice of the protest of the bill in question, and the time when they gave notice to the Defendant: And, as the former resided at *Philadelphia*, and the latter at *Poughkepsie*, in the state of *New-York*, the distance of these places, which is less than 150 miles, does not sufficiently account for so extraordinary a delay, even though it happened during a war. 1788.

It is well understood, that notice of a protest ought to be given in a reasonable time; and, by not giving it, the indorser takes the loss upon himself: 1 *Salk.* 127. 2 *Black. Rep.* 469. *Cun. Law, of B. of E.* 40. *Sect.* 6. *Doug.* 497. *Term. Rep.* 168. 5 *Burr.* 2671. And want of notice is tantamount to payment. *Term Rep.* 408. 712.

Upon the whole, we think this cause requires a *re-examination*; that the verdict was against the *strength* of the *evidence* given on the trial, and the *law* respecting reasonable notice; and that the Defendant, who has no remedy over but against *John Witherspoon* the prior indorser, or *James Whitelaw*, the drawer of the bill, will be improperly exposed to a great loss by the neglect of the Plaintiffs, if those persons should, in the mean time, have become insolvent.

A new trial awarded.*

* See *post. same cause*, and *Robertson et al.* v. *Vogle* in the *C. P.* 2 *Dall. Rep.* 158. 192.

Oyer and Terminer, &c.

AT PHILADELPHIA.

February Sessions, 1788.

RESPUBLICA *v.* SHAFFER.

AFTER some conversation with the Grand Inquest, the Attorney General informed the Court, that a list of eleven persons had been presented to him by the Foreman, with a request, that they might be qualified and sent to the Jury, as witnesses upon a bill then depending before them. He stated that the list had been made out by the Defendant's bail: that the persons named were intended to furnish testimony in favour of the party charged, upon facts with which the inquest, of their own knowledge, were unacquainted; and he concluded with requesting, that the opinion of the Court might be given upon this application. THE CHIEF JUSTICE, accordingly, addressed the Grand Jury to the following effect:

M'KEAN, *Chief Justice*.—Were the proposed examination of witnesses, on the part of the Defendant, to be allowed, the long established rules of law and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property, must be tried by *twelve* of his peers; and that their *unanimous* verdict is, alone, competent to determine the fact in issue. If then, you undertake to enquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the Petty Jury, you will supersede the legal authority of the Court, in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind

of any lawyer, and they may easily be removed by a proper consideration of the subject. For the bills, or presentments, found by a Grand Jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial: 'till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here then is the just line of discrimination: It is the duty of the Grand Jury to enquire into the nature and probable grounds of the charge; but it is the exclusive province of the Petty Jury, to hear and determine, with the assistance, and under the direction of the Court, upon points of law, whether the Defendant is, or is not guilty, on the whole evidence, for, as well as against him.—You will therefore readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal, or condemnation. But this would involve us in another difficulty; for, by the law it is declared that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain that the enquiry, now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the Petty Jury receive no bias from the sanction which the indorsement of the Grand Jury has conferred upon it.—But, on the other hand, would it not, in some degree, prejudice the most upright mind against the Defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient?—which would then be the natural inference from every *true bill*. Upon the whole, the Court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the Defendant, while the charge against him lies before the Grand Jury. 1788.

One of the Grand Inquest then observed to the Court, that "there was a clause in the qualification of the Jurors, upon which he, and some of his brethren, wished to hear the interpretation of the Judges—to wit—what is the legal acceptation of the words "*diligently enquire?*" To this the CHIEF JUSTICE replied, that "the expression meant, *diligently to enquire* into the circumstances of the charge, the credibility of the witnesses who support it, and, from the whole, to judge whether the person accused ought to be put upon his trial. For, (he added) though it would be improper to determine the merits of the cause, it is incumbent upon the Grand Jury to satisfy their minds, by a *diligent enquiry*, that there is a probable ground for the accusation, before they give it their authority, and call upon the Defendant to make a public defence."

Common Pleas,

PHILADELPHIA COUNTY.

March Term, 1788.

POULTNEY *et al. v.* ROSS.

AN appeal being entered from the judgment of *Isaac Howell, Esquire*, one of the Justices of the city of *Philadelphia*, &c. on the trial of the cause, it appeared, that the Defendant went to the store of the Plaintiffs, and bought some articles, for which he afterwards paid; that, at the same time, he carried with him one *Hawke*, a joiner, who complained that he was frequently distressed in his trade, for want of a small credit; whereupon the Defendant told the Plaintiffs, that he did not think they would suffer by trusting him for two or three dollars, as he was an industrious and honest man, and that he (the Defendant) would see the money paid; that the Plaintiffs accordingly delivered to *Hawke* sundry articles at different times proper for his trade, as a carpenter and joiner, amounting to £. 5 and upwards; that at the distance of 9 months, having enquired after *Hawke* and found he had eloped, they sent an account for those articles to the Defendant, *who was charged in their shop-book (which* Poultney, *one of the Plaintiffs, proved to be their book of original entries) as the absolute purchaser;* and that before the Justice, from whose judgment the appeal was made, the Defendant, though he insisted that *all* the articles were not for his use, acknowledged the receipt of *some* of them,

Upon these facts the question arose, whether the entry in the Plaintiff's shop book, attested by one of them, upon solemn affirmation, was sufficient, in this case, to charge the Defendant? And the *President* delivered the following charge to the Jury.

SHIPPEN, *President*.—As the law that has prevailed upon this subject, is adapted to the peculiar situation of the country, it will naturally differ from the law which is established in other places, under different circumstances. Thus, though in *England*, the shop-book of a tradesman is not evidence of a debt, without the assistant oath of the clerk who made the entry; yet *here*, from the necessity of the case, as business is often carried on by the principal, and many of our tradesmen do not keep clerks, the book, proved by the oath of the Plaintiff himself, has always been admitted. The practice in this respect, however, has been confined to charge the original debtor, to whom the goods were sold; for, the necessity of the case only required, that the Plaintiff's oath should be allowed to prove the actual delivery; and it would be highly dangerous, if the evidence were extended to establish the assumption of a third person to pay the debt. 1788.

It is the duty of the Jury, therefore, to consider, whether the Defendant, on the present occasion, is the original debtor, or merely a person assuming to pay the debt of another. If, indeed, it appears, that he has sent a servant, or tradesman, for these goods, on his own account, he is clearly liable; for, when they come to his use, *that* makes him the original debtor. But, if I go to a shop with a joiner, and say to the master, "I will see you paid for the articles with which you trust this man;" here, though I am liable upon proof of this undertaking, yet it is not in the character of the original debtor, for the joiner who received the goods is the original debtor; but it is on account of what the law terms my collateral promise; which cannot be proved by the testimony of the party interested, but, may by a note in writing, or by some indifferent witness to the transaction.

In the case before us, the evidence of the Justice (Mr. *Howell*) is not certain as to the circumstances; for, the goods were delivered in small parcels, from time to time; they were such as suited the joiner's business; and, even, from the Plaintiff's own account, they were applied to his use, though the Defendant was considered to be liable for the payment. Whether these facts, therefore, and the Defendant's previous purchase at the Plaintiff's store, will account for the acknowledgment of having received *a part*, the Jury must determine. But if they are of opinion, that the Defendant has only assumed to pay the debt of another person, the Plaintiffs cannot be witnesses in the cause, and, consequently, there is no proof of the assumption. On the contrary, if they think the Defendant is the original debtor, the Plaintiffs are witnesses to prove the entry in their book, and they are entitled to recover the amount of their demand.

VERDICT for the Defendant.

BROWN *v.* SUTTER.

SHIPPEN, *President*, said, in this case, that the Court would never open a regular judgment, to let in a plea of the statute of limitations.

1788.

NEWMAN *v.* BRADLEY.

IN this case *Howell*, who was of Council with the Plaintiff, proved that the Defendant on a citation to shew cause of action, &c. acknowledged that he borrowed the money in question, from the Plaintiff, but declared, at the same time, that he had repaid it. This was the chief evidence to support the action; and *Howell* and *Tod* contended, that the acknowledgment was, of itself, sufficient to charge the Defendant, but that what he said in avoidance of the Plaintiff's demand ought to be proved. *Gilb. Law of Ev.* 51.

Levy, on the contrary, urged that the confession must be taken in the whole, as well that part, which acquits the Defendant from the debt, as that which tends to charge him with it. *Tri. per Pais.* 363. He allowed, however, that there were some cases, where the confession might properly be believed against the party who makes it, though rejected in those points which operate in his favour. Upon an indictment of *Larceny*, for instance, if the Defendant says he had the stolen goods in his possession, but alleges that he bought them, the Jury will give credit to the former, but disregard the latter part of his confession. The improbability of the circumstance, alleged in excuse or exoneration, is the criterion to judge from; and in the case cited from *Gilb. Law of Ev.* 51. the improbability that so large a sum should be given as a reward out of so small an estate, was perhaps the ground of decision. But, in the present case, the object (about £. 10.) was trifling in itself, and no circumstance of improbability attended the Defendant's relation of the fact.

SHIPPEN, *President*.—This is the very case put in the books, and the rule which is founded upon it, extends generally to all civil suits. When a confession is given in evidence, all that was said must be stated, and the whole, generally speaking, ought to be taken together, unless such circumstances of improbability appear, as will render it necessary for the Defendant to prove what he asserts in avoidance of a conceded fact. It is true, there are some occasions when a Jury will charge a man with what he acknowledges against himself, and yet refuse to credit him for what he advances in his own favour. As, if he should admit, that he purchased the goods, which the Plaintiff alleges were sold to him, but insists that he paid for them at a particular time and place, in the presence of certain persons; and those persons, on being examined, declare that they were present at the time and place mentioned, but that they did not see the Defendant make any payment to the Plaintiff: here, undoubtedly, the rule ought not to operate.

In the present case, also, the Jury will not be influenced by the Defendant's saying he repaid the money, if they do not think it credible, or if any thing can be gathered from the evidence, to shew that it was not paid, when he says it was.

Verdict for the Plaintiff; owing, I believe, to some slight testimony, that seemed to repel the idea of the Defendant's having repaid the money. 1788.

When *Howell* offered himself as a witness, *Levy* objected that he was interested, inasmuch as his judgment-fee depended on his success in the cause. But the objection was over-ruled by the Court.

JACKSON *et al. Ex'rs v.* VANHORN.

JUDGMENT had been entered by *non sum informatus* in this cause, as the Defendant did not appear on the day of trial. But *Sergeant* now moved to open the judgment, upon an affidavit that the Defendant had notice of the trial for the 17th, instead of the 13th, and that there was a just and conscionable defence.

Lewis, for the Plaintiff, said, that he did not mean to contest the matter, but he wished it to be settled, whether the mistake of an Attorney was, in such cases, sufficient to set aside a judgment.

BY THE COURT. On a mistake of this kind, evidently appearing, we cannot refuse the motion.

PENMAN *et al. v.* WAYNE.

A RULE had been obtained to shew cause why the *Capias*, which issued in this case, should not be quashed, the Defendant being a freeholder in the county of *Chester*. It appeared, that, with the *Præcipe* for the writ, an affirmation of one *Rumford Davis* was filed in the *Prothonotary's Office*, setting forth, that "the Defendant had not been *resident* in this State for two years "before the date of the writ;" and, it was contended, that this was sufficient, under the act of Assembly, to repel the Defendant's claim of privilege. 1 *St. Laws* 139.

The question, therefore, was, whether the Court could, notwithstanding the affirmation filed *before* the writ issued, enquire into the matter of *residence*, in order to determine on all the circumstances of the case, whether the Defendant was within the exceptions of the act? It was twice argued, on the 21st and 23d of *May*, by *Sergeant* for the Plaintiff, and *Lewis* for the Defendant; and the substance of both arguments was as follows.

For the Plaintiff.—The act of Assembly rests the proof exclusively on the affidavit of the party, or some person for him; requiring only that he should make the fact, which defeats a freeholder's privilege from arrest, appear to the Justice who grants the writ. Nor will the section admit of the division for which the adverse Council contend; because, though there is a clause providing that things shall not be proved by affidavit, which, in their nature establish a higher degree of proof; as judgments,

1788. mortgages, &c. yet, even subsequent to that clause it is said, *as the Deponent believes;* an expression which manifestly relates to the first part of the section, and necessarily connects the whole. If, indeed, the Court were to investigate the facts, both parties are entitled to a hearing, and a new and preliminary scene of litigation would be opened, involved in endless difficulties. The Legislature, therefore, wisely made the filing the affidavit *before* the writ issued, the conclusive test for holding the Defendant to bail; and, from the circumstances under which the law was passed, we are authorized to assert, that without these easy exceptions, the privilege itself would never have been granted.

But, if the doctrine which the opposite side advance is allowed, the *2d and 3d sections* of the act would contradict each other, instead of holding that clear and fair meaning, which, taken according to their distinct objects, they naturally present. For, should any one, contrary to the spirit of the *1st section*, isssue a *capias* against a freeholder, then the *3d section* provides a remedy, by directing the Court to stay all proceedings against the Defendant, until they examine his circumstance, and if they find he is such as the act intended to be exempted, they are required to abate the writ. But this is in the case of *an arrest in the first instance*, and not of a *capias* founded upon *an affidavit previously filed*, according to the terms of the *2d section;* which terms make *a condition precedent*, and, being complied with, the most wealthy freeholder is subject to an arrest; nor can the Court afterwards interfere to relieve him.

For the Defendant.—The act of Assembly upon this subject is clearly divided into two parts; *first*, it treats of those cases which depend implicitly on the affidavit of the party, stating the facts uncomplicated with law; and *secondly*, it treats of those cases, which depend on their respective circumstances, when brought into question before the Court. The present case does not come within the first class, but is fairly within the second; for, having enumerated all the exceptions which may be proved by the oath of the party, or some person for him, the act goes on to state the exceptions which are to be made appear *from records or otherwise;* and, the very last of these, is the instance on which the controversy arises.

The Defendant's objection being thus warranted by the letter of the law, will be supported, likewise, by the principle and reason of the thing. For, would it not be absurd to leave it to an illiterate, though honest man, to determine what constitutes a legal *residence?* or, to suffer an unprincipled, though cautious, Plaintiff, to take advantage of a short absence, to justify his swearing, that the Defendant has not been *resident* within the State, for two years before the arrest? If the Court cannot at all develope the circumstances, it will make no difference in the case, whether the absence is for a year, or a day; on a party of pleasure, or a journey of business; the privilege of the most substantial freeholder, must lie for ever at the mercy of his antagonist; and even a continental officer, dispatched upon the duties of his profession to another State, will be equally liable to

this constructive abridgment of the rights of citizenship. A stronger illustration of this truth cannot be required, than the cause before the Court; for the Defendant has, within the very two years, specified in the affirmation, represented this Commonwealth in the *General Assembly*, in the *State Convention*, and in *Congress;* and yet, it is contended, that the vague idea of an unlettered individual on the point of *residence*, shall be sufficient to deprive him of the privilege of his freehold, and, in effect, to declare him an alien. 1788.

There is, however, an essential difference between *residence*, and *abiding* in a particular place. It is admitted, that the Defendant did not *abide* within the State for two years before the arrest; but, we contend that, nevertheless, in contemplation of law, his *residence* was here: For, a man is always presumed to *reside* where his family is; and, though when he goes abroad upon any temporary avocation, he *abides* in that district to which he goes, yet this does not destroy his *original, domestic residence*. By one act of Assembly it is provided, that foreign attachments shall only issue against such as are not *resident* within the State; 1 *State Laws* 44. And by another act, 1 *State Laws* 170, it is declared, that no person who has not *resided* within the State two years before his imprisonment, shall have the benefit of the insolvent laws: In these cases, and in the construction of the *Poor Laws*, and, in short, of all the statutes in which the word occurs, it has been the invariable practice of the Courts to enquire into the facts, upon which the *residence* is either asserted or denied; and, on that enquiry, to pronounce the law. Thus on the petition of one *M'Intire* for the benefit of the insolvent law, although he had been absent more than two years and a half; yet, as it was in proof that he was *a native*, and always *intended to return* hither, this Court lately determined that his *residence* became a matter of law, and that the *animum revertendi* was sufficient to prevent his losing the advantages of it.

What then is the proper interpretation of the act upon this subject?—That the party shall set forth in his affidavit such facts, as will enable the Court to draw the legal inference, with respect to the Defendant's *residence;* which, after all, is a technical term, 5 *Burr.* 2724, and the maxim is well established, that a witness may swear to matter of fact, but not to matter of law. This rule, indeed, (which applies in all cases of evidence) satisfactorily explains why a disjunctive is introduced in the section under consideration; why the provision in the former part of the clause, that the Justice who grants the writ shall administer the oath, is omitted in the latter; and why the words, *the Plaintiff, or some other person for him*, are dropt, when the section comes to treat of those things which are matter of law;—for the expression *as the Deponent believes*, at the same time that it precedes the sentence respecting the Defendant's residence, evidently relates to the value of the estate, and not the mode of proving the incumbrances that affect it. But surely the Legislature could not mean to make a man the judge both of fact and law in his own cause, and that

1788. without appeal. *Holt* asserts that an act of parliament which should authorize so unreasonable a thing, would be void; and it is fortunate, on this occasion, that a candid review of the law itself does not countenance this absurdity, which lies only in the Plaintiff's construction. The first clause defines the persons privileged; the second narrows down the privilege by a variety of exceptions; these exceptions are either in fact or law; and the exceptions in law are such as must either be determined by the records themselves, or by the Court upon a statement of the facts on which they arise. If, therefore, it had been intended to leave the matter of *residency* entirely to the affidavit of the party, the division of the section by the word *or*, would have been postponed, and this sentence must then have been classed before those things which are to be proved *from records or otherwise*. Nor is the word *otherwise* to be considered as merely distinguishing the proofs by record, from those by affidavit; but as meaning such other evidence as the common law requires: for, surely it would be as improper, nay, more dangerous, to permit a man to swear as to the *residency* of his adversary, than as to the existence of a mortgage or judgment, which he might easily ascertain, by inspecting the dockets and records in which they are entered.

But, let us suppose, that there was no disjunctive in the section, and enquire, for a moment, whether the Court, even on that ground, have not a right to investigate the facts contained in the affirmation? By the last sentence of the second section, all the affidavits, taken in pursuance of the act, are directed to be filed: now, this cannot be intended merely to shew that an affidavit has been made, for that would sufficiently appear from the entry in the docket; but as another, more beneficial, purpose, results from this practice, the Court will think themselves bound to support that purpose, as the real object of the Legislature; and will determine, accordingly, that the filing of the affidavits is intended to give the Judges an opportunity of seeing, on any future controversy, whether the allegations bring the case legally within the exceptions of the act. In the instance of *residence*, above all others, as few Plaintiffs comprehend the technical import of the word, this provision seems to be indispensable; and when the 3d section says, that if the Court *find* the Defendant is such as by the act is intended to be exempted from arrest, it furnishes a conclusive argument, that they must examine the evidence produced by the parties; for, in order to *find* a particular object, it is clearly requisite, in the first place, to *search* for it.

These ideas on the subject are, likewise, corroborated by the uniform practice of the Courts; which has been to issue the *capias* at once, leaving the proof of the exception, 'till the Defendant makes his claim of privilege. The Defendant in the present case would be under no difficulty to obtain bail; but the principal ground of his opposition is, that if he now tacitly suffers himself to be arrested, his privilege, by the words of the act, will be for ever extinguished.

For the Plaintiff, in reply. Though the best freeholder may be arrested after notice to enter special bail, yet, as this is a compulsory process, it will not destroy his privilege in another action. To do that, there must be a willing submission to an arrest, by which the Defendant holds out to the world that he is not within the privilege of the act. 1788.

Residence is certainly a construction of law in a great variety of instances. *Nutbrown*'s case in *Foster* 76. shews that a man may have several places of *residence*, and any of them may be the subject of a *Burglary*. So, by the *Poor Laws*, a man may live in a particular place all his life except one day, and yet not acquire a *legal residence;* for, he may be under a certificate, or he may not have complied with the conditions of the statutes: And in the case of *Ambassadors*, although they actually *reside* abroad, their children are deemed natural born subjects of the realm. *5 Burr.* 2724. is grounded on the words of the act of Parliament. But the act of Assembly in discussion, clearly meant a *literal* and not a *technical and constructive residence*, or it would not have been made the subject of an *affidavit*, which is to be sworn by persons not generally possessed of *technical* information.

The decisions under the attachment law, establish a distinction between *inhabitants* and *residents;* as in the case of *Lazarus Barnet*,* where the foreign attachments were quashed, because he came under the former description. With respect to decisions under the insolvent laws, whether the petitioner has resided in the State two years, or not, is a matter immediately before the Court; but in the present case, it is a fact to be sworn to in order to entitle the Plaintiff to a certain advantage. The whole law is connected, indeed, by the idea of an affidavit; and there are many instances where an incumbrance to diminish the value of the Defendant's estate may be proved without producing the mortgage or record. For example; at any time before the acts for recording deeds and mortgages; or, within six months, since those acts respectively, evidence might be given of a mortgage in the hands of a third person; or a *scrivener* might prove that he had witnessed the execution of a conveyance from the Defendant.

The reason for filing the affidavit, is, that it may appear to the Court what it contains; for, swearing to *any thing* does not entitle the Plaintiff to bail. If, however, it is made in conformity to the act, it is conclusive; then, (as Lord *Mansfield* somewhere expresses himself) he is sworn, and you have no remedy but to prosecute him. The act says, *in all such cases*, that is, where the regular affidavit is made, a *Capias* shall issue. This is included in the very clause where judgments are mentioned; so that, in strictness, the exception founded on judgments ought, likewise, to be accompanied with an affidavit. Nor is this making a man the judge in his own cause; for he only swears to the words in their literal and customary meaning and import.

* *See ant.* 152.

1788. The law declares that if *any freeholder exempted from arrest* by virtue of this act, shall happen to be taken by a writ of arrest, the Court shall abate the writ. But, if an affidavit has been filed agreeably to the 2d *section*, no man can be a freeholder exempted by the act from arrest; and, consequently, the *Capias*, in this case, shall be maintained. The act was evidently the result of a compromise between contending parties; one side obtained a general clause exempting freeholders from arrest; and the other side, guarded against this privilege by a proviso, which, in fact, puts it in the power of any person to compel a freeholder to give bail. But if the Court can enquire into the facts in all cases, this provision is a mere snare; for should the weight of affidavits be eventually against the Plaintiff, he will not only lose his action, but be condemned in treble costs.

Upon the *first* argument, SHIPPEN, *President*, observed, that there was considerable ambiguity in the act of Assembly; and that he was not satisfied with respect to the meaning of the expression "where the Plaintiff *can make appear* from records, or otherwise," as it was not specified to whom the exception should be made appear. He said that in several cases (one of which he remembered was on Mr. *Levy*'s motion) it had been determined that the second section of the act was disjoined; and that no affidavit was necessary to support the exception founded upon a judgment, which was the legal test of its own existence, and no other evidence would be received to prove it. He added, at the same time, that the words, *as the deponent believes*, clearly related to the Defendant's not having a sufficient estate left to satisfy the Plaintiff's demand; that it is not necessary to set forth the facts in the affidavit under this act, as it is in *England* where a positive affidavit is required to hold the Defendant to bail; that if, indeed, the whole of the second section were connected, it would amount to a condition precedent, and a positive affidavit would preclude the Court from any enquiry into the facts; but, he continued, that the section was not only disjoined by the words of the act (in the first place admitting proofs *by affidavit* or affirmation; and in the second place requiring proofs *from records or otherwise*) but also by the reason and propriety of the case, which will not permit a Plaintiff, in his own favour, to determine what constitutes a legal residence.

Smith, the Prothonotary, being asked as to the practice, said, that in some cases the affidavits were filed before, but, more frequently, after the issuing of the writ. If the suggestion was, that *the Defendant intended to go abroad*, the affidavit had always been filed in the first instance; but with respect to the case of *residence*, he did not recollect any instance, before the present, where that was done.

The PRESIDENT now delivered the opinion of the Court.

SHIPPEN, *President*.—We have found some difficulty in obtaining a satisfactory idea of the meaning of the second section of this act. It would seem, by the former part, that the exception, upon

which the *Capias* is grounded, ought to be made appear to the Justice who grants the writ; but, in the latter part, when the disjunction of the clause occurs, the expression is general, if *the Plaintiff can make appear from records or otherwise*, without saying to whom he shall make his allegation appear. At first, indeed, I thought this might also relate to the Justice who grants the writ; but on a further consideration of the subject, I am convinced, that unless the Legislature intended something more, it would never have been provided by the third section, that the Court shall stay all proceedings against the Defendant, *till they examine his circumstance;* for, it would have been useless and nugatory to direct that examination, if they were, nevertheless, bound by the contents of the affidavit. 1788.

Besides, upon the principles of common justice, it is material, that the Court should have the power of making an enquiry into the facts; for, though the Plaintiff's opinion is taken, in the first instance, to ascertain whether there is a sufficient estate left for the payment of his demand; yet it would be unreasonable to deprive the Defendant of his privilege, if he could afterwards shew, that, independent of a trifling mortgage or judgment, an ample security was left for his adversary's debt. Nor is the equity of the case less applicable upon the question of *residence;* for, an occasional absence of a month, or a week, might with safety be made the foundation of the affidavit required by the act; and, yet, who will say, that, in law or reason, this ought to work a disfranchisement of the Defendant?

The law is explicit, that if the Court find the Defendant is such, *as by the act is intended to be exempted*, the writ shall be abated; and this, surely, also implies something beyond a mere enquiry, whether an affidavit has been previously filed. If he is such "as by the act is *intended* to be exempted," is a sentence materially to be regarded in the clause; for, otherwise, it would have been sufficient to say, that if no affidavit is filed, nor any mortgage or judgment is produced, the Defendant shall be discharged from the action.

It is evident, upon the whole, that the Legislature did not mean to subject a citizen of large estate to the process of a *Capias*, on account of a short absence from the State; and, therefore, we are of opinion, that they have left a controlling power in the Court to enquire into the circumstances of the case, and to relieve a Defendant from an arrest, if we think he was *intended* to be exempted, although the words, that *he has not been resident*, may be inserted in the Plaintiff's affidavit.

The Defendant was, accordingly, allowed to controvert the fact, of his not being resident in the State for two years before the writ issued.*

* See post. the same case.

1788.

JAMES *et al. v.* YOUNG.

JUDGMENT being entered by default at the first term, *Mifflin* had obtained a rule to shew cause why it should not be opened, upon the affidavit of a *third* person, that the Defendant was bedridden, and that there was a just and conscionable defence.

Todd afterwards opposed the action as grounded upon the affidavit of a *third* person.

But BY THE COURT:—A third person fully acquainted with the circumstances ought certainly to be admitted to make the affidavit of a defence when the party himself from extreme sickness is incapable of making it; but when he is present, and subject to no disability, it is regularly incumbent upon him to do it. This, however, is a case under very particular circumstances; and the judgment was entered at the first term. We think, therefore, the judgment ought to stand as a security; but that the Defendant must be let into a trial upon an issuable plea.

COOPER *v.* COATES.

ON a rule to shew cause, why auditors should not be appointed, under the act of Assembly, the Defendant's deposition was read, wherein he swore, that no question of depreciation could arise in this cause.

BY THE COURT.—The words are so very general and comprehensive, that, if the spirit and intention of the law, expressed in the preamble and other sections, were not to be considered, they would include every case arising between the periods mentioned in the act. But it is inconsistent with the Constitution, and with justice, that the trial by Jury should be taken away in this manner; and, therefore, the Courts of Justice have always determined, that auditors shall be appointed only where there is a dispute about the depreciation.

The rule discharged. *Hollowell*, for the Plaintiff—*Sergeant*, for the Defendant.

WALLACE surv. part. *v.* FITZSIMMONS sp. bail.

THE case was this: *Hoe* and *Harrison* of *Virginia* being indebted to *Wallace* and *Smith*, *Wallace*, as surviving partner of *Smith*, issued a foreign attachment against them, and attached their effects in the hands of *Fitzsimmons*. Judgment was obtained on this attachment at the third term; and, afterwards, *Fitzsimmons* entered special bail. The cause then proceeded, till judgment was

finally obtained against *Hoe* and *Harrison*, and upon the return of a *Ca. Sa. non sunt inventi*, an amicable *Scire Facias* was entered against *Fitzsimmons*, judgment was thereupon obtained, and an execution issued, for the whole sum recovered against the principals in the original suit. It appeared, that during these proceedings, the executor (who was also the brother) of *Smith*, the deceased partner, applied to *Fitzsimmons*, and forbade his paying more than one half of the money to *Wallace;* offering an indemnification for the payment of the rest to him, and alleging that the partnership was considerably indebted to the estate of the deceased. *Fitzsimmons* accordingly gave notice of this application to *Wallace*, and, afterwards, paid one half of the money to the executor; although a letter from him to *Wallace* was produced, in which he had declared, that he would not pay it either to him or to *Smith*, but that the law should take its course, and determine the right between the executor and the partner. 1783.

A rule was obtained, which in the argument, the Council consented to consider, either as a rule to shew cause why on paying to the Plaintiff £.715. (being one half of the sum recovered from *Hoe* and *Harrison*) the proceedings on the execution should not be staid: or, as a rule to shew cause, why the execution should not be set aside, and the judgment opened, in order to let the Defendant into a trial on the plea of payment.

On this rule, two questions were brought before the Court: 1st, In point of fact, whether *Wallace* had acquiesced in the payment to the executor? and 2dly, In point of law, whether the payment to the executor did not discharge *Fitzsimmons* from the demand of the surviving partner.

The *Defendant*'s Council endeavoured to shew, that *Wallace*'s silence, after he was informed of the executor's claim, amounted to an acquiescence in the payment; and, consequently, that *Fitzsimmons*, who was an innocent stake-holder, ought not to be made liable for the repayment of the money. 4 *Burr.* 1985. 2 *Ld. Raym.* 1210. *Bull. L. N. P.* 133.

But as this argument, in point of fact, did not seem to be supported by the testimony, they contended, that, in point of law, the payment of a debt to the executor, or other representative of a deceased person, was a good payment; and that the Courts of Justice would not unravel it, in an action by a surviving partner to compel a second payment of the same debt. In this case, they said, it was to be presumed the deceased did not die insolvent, because he had left a will; and whatever property he was worth, after payment of his debts, the executor, who was also his heir at law, was clearly entitled to receive. They allowed that the surviving partner was the proper person to collect the joint credits; but urged, that, when they were collected, he became merely a trustee for the executor, or next of kin: and hence, they inferred, that if there was really a balance on the company accounts in favour of the deceased partner, a strong principle of equity inter-

1788. posed, that his representatives should not be compelled to take a circuitous route to obtain it; more particularly, when it must affect the interest of a third person.

But it was answered for the *Plaintiff*, that this was the first instance in which it had been suggested, that an executor of one partner could, in this way, settle the partnership accounts. The law, which makes the surviving partner liable for the joint debts, by a necessary consequence, gives him the exclusive control over the partnership effects, and every action, founded on a joint transaction, must be brought in his name. The general rule, indeed, with respect to joint owners, is, that the interest itself shall survive; but, in the case of partners in trade, it is only the right of action, and not the interest, to which the survivor is entitled. This right, however, is essential to justice, and for the benefit of commerce; for, the inconveniency would be inconceivable, if, upon every suggestion of a balance due to a deceased partner, it was incumbent on the survivor to travel into all the circumstances of the company. In the action between *M'Cartey*, surviving partner of *Cummings*, against *Nixon*, it appeared that the Defendant had administered on the estate of the deceased partner, and retained the company effects for a separate debt due to him from *Cummings;* but the *Supreme Court* determined that the administrator, in that case, had no right to retain; and that he must resort to his action of account render against *M'Cartey*, in order to obtain satisfaction from the joint stock.

With respect to the presumed acquiescence of *Wallace*, it was observed that the evidence contradicted the presumption; and that, independent of every other consideration, *Wallace*'s continuing to prosecute the suit, amounted to a prohibition. There is, therefore, no fact upon which the cause could be submitted to a Jury; whether the payment to the executor is good, or not, being a matter of law.

SHIPPEN, *President*.—It may probably be a hardship upon the Defendant, but he has certainly made himself liable to the Plaintiff's demand. A payment to an executor, or administrator, can be no satisfaction to a surviving partner, who has the sole right of suing for, and of receiving the monies, due to the company. The point of law is, therefore, exceedingly clear. Nor can we in this manner attempt to investigate the partnership accounts.

With respect to the point of fact, it does not seem to be at all established. If, indeed, the acquiescence of the Plaintiff had been proved, we should have thought it a proper subject for a Jury to determine. But, as the matter stands, we must leave the Defendant to this consolation, that, even if he has not already taken an indemnification, he may recover the money back from the executor, having paid it in his own wrong.

The rule discharged.*

Lewis, for the Plaintiff.—*Wilson* and *Rawle*, for the Defendant.

See 2 *Vol.* 65. *in note.*

1788.

SCHLOSSER *v.* LESHER.

INGERSOL read an affidavit, stating the want of a material witness, who had been *subpœna'd*, and moved to put off the cause for that reason.

Levy prayed that, if the cause was continued, it might be under a rule to try next term, or *Non Pros;* and mentioned a case argued in this Court by *Lewis*, when it was so ruled.

Ingersol objected, that the rule for trial or *Non Pros*, was granted upon some *laches* on the part of the Plaintiff; and that there was no idea of that kind in the present case. He added, that the practice in the *Supreme Court* was contrary to the rule prayed for.

BY THE COURT.—Let the rule be entered: But this will not preclude the Plaintiff from shewing reasonable cause of delay, at the next term.*

SHIPPEN's Lessee *v.* BUSH.

BANKSON moved for the appointment of referees in this cause, in the absence of the opposite Council; though, as he said, by agreement.

But, BY THE COURT: It is an invariable rule not to appoint referees, but in the presence of both parties. So many disputes have arisen about what was the meaning of the attornies, that we have determined not to pay any regard to agreements, which are not reduced to writing.

GILPIN *v.* SEMPLE.

HALLOWELL moved for a rule to take the depositions of going witnesses, &c. before the return of the writ in this cause.

BY THE COURT.—It has not been determined, upon argument, though often mentioned at the bar, whether we can grant the rule before the return of the writ, or not. But it has been the practice to take the deposition, *de bene esse*, under a rule, subject to the opinion of the Court; and this upon the authority of the case in *Sheridan*. Notice, however, should be given to the Defendant, as no appearance, by attorney, can be yet entered.

* 2 *Vol.* 44.

1788.

ROBERTSON *et al. v.* VOGLE.

IN this action the Plaintiffs declared, *as Indorsees*, upon a promissory note, against the Defendant *as Indorsor*, both the parties residing in the city of *Philadelphia*. It appeared, on the trial, that the note was drawn on the 10th *April*, 1786, and that it was protested for non-payment on the 12th *June*, 1786; but on the 5th of *July* and on the 23d of *August* following, the Plaintiffs received several partial payments from the drawer, without attempting to give notice of the protest to the indorsor, till after the last of those payments, when the drawer had become greatly embarrassed in his circumstances. Nor was there, indeed, any other evidence of notice, previously to the commencement of the action, to *March* term 1787, than that the Plaintiff's clerk had frequently called at the Defendant's store, but was not certain that he had ever seen him, or left a note of his business.

Ingersol moved for a non-suit on two grounds: 1st, Because the receipt of a part of the money from the drawer, is a discharge of the indorsor for the whole; and 2dly, Because the Plaintiffs did not give reasonable notice of the protest to the Defendant.

1st. On the *first* point he contended, that the indorsor of a promissory note, is only a warrantor that he will pay the money, if the drawer does not; and that if the indorsee receives a part, he takes upon himself to give credit to the drawer, and discharges the indorsor. 1 *Wils.* 46. *Hall* v. *Pitfield.* 2 *Stra.* 745. *Kellock* v. *Robinson*, *S. P.*

2d. With respect to the *second* point he cited *Term Rep.* 167. *Easter.* 27 *Geo.* 3. *Tindal et al.* v. *Brown*, where it is said, that when a note is not discharged by the drawer, the holder must give reasonable notice to the indorsor; that this means something more than making it known; for it is not enough that he says the drawer has not paid, but he must declare that he does not mean to give credit; and, therefore, when the circumstances are ascertained, what is reasonable notice is a question of law and not of fact. As to the giving time, the holder does it at his peril, for it has never been determined that the indorsor is liable, where the holder has given credit to the drawer; so that the want of notice is tantamount to payment. *Id.* 712.

Sergeant and Barton, for the Plaintiffs, argued, 1*st.* That the acceptance of a part shall not prejudice the holder of a bill or note. *Marius* 6. 8. 9. 86. 87; and, as upon the authority of this book, the Court had determined a former question,* they said it could not be shaken, in the present instance, by *Wils.* 46, which was not a decision in the principal case, but an *obiter dictum*, referring to a preceding determination for an argument *a fortiori;* nor by 2 *Stra.* 745, which was a short *Nisi Prius* note. Besides, these reports give no reason for their decisions, but *Marius* assigns a very satisfactory one for his doctrine; to wit, that it is bene-

* See *Ant.*

ficial to the indorser that the holder should receive as much of the money as he can from the drawer, since thereby so much is saved to him. There is a material difference, however, between the principles and usage in *London* and *Amsterdam*, and the custom of *Philadelphia* upon this, as well as the point of notice; for long indulgence and the course of business, have not yet brought us to the precise and strict practice of those capitals. 1788.

2dly. With respect to the *second* objection, they said, that the Plaintiff's clerk went repeatedly in pursuit of the Defendant; and proof of making enquiry after him is sufficient to excuse giving notice, unless he shews that he might have been found. *L. N. P.* 273. 274. But, at all events, they insisted that what was reasonable notice was a matter of fact, and not of law; 1 *Stra.* 508. 2 *Stra.* 829. 1175. 1 *Black. Rep.* 1. For, though it is true, that there are many facts upon which, if the Jury proceed contrary to the opinion of the Court, a rehearing will be granted; yet they must, at last, be determined by a verdict: In *Trover*, for instance, the *conversion* can only be found by a Jury, it cannot be found by the Court. That reasonable notice is a fact of the same kind, was conceded by very eminent Council,* in opposition to the interest of his client. *Doug.* 496. 7. The propriety of the rule is abundantly more striking here than in *England;* and as a Jury alone can decide upon the circumstances of the country, and the relative situation of the parties, it ought to be left to them to ascertain the reasonableness of the notice.

Ingersol, in reply, said, that the case was of great importance to the mercantile interest; and that the mischief would be fatally extensive, if the adverse arguments prevailed. He contended, however, that in whatever form the Plaintiffs choose to proceed, they must fail in their action. For, if they bring their suit at *common-law*, then it cannot be maintained at all; since, at common-law, a *chose in action* is not assignable; nor is an assignor responsible unless he expressly warrants; and, if they bring it upon the *custom of merchants*, then, in order to recover, they must shew that they have, on their part, complied with the custom, which required that reasonable notice of the non-payment, should have been given to the Defendant. But, as the common-law is not applicable, and the *act of Assembly* does not meddle with the case of *indorsors* and *indorsees*, the declaration must undoubtedly be founded upon the statute of *Anne* and the custom of merchants; and if the Plaintiffs are allowed to take advantage of these to maintain his action (waving the question whether the statute extends to this country) the Defendant cannot be precluded from taking advantage of them, likewise, to support his defence. Upon this ground the usage must be universal: For, the statute of *Anne* places promissory notes on the same footing with inland bills of exchange, and inland bills of exchange, in the preceding reign of *W.* 3. had been placed on the same footing, with foreign bills—so that any distinction, between the cities of *Am-*

* *Dunning.*

1788. *sterdam* and *London*, and the city of *Philadelphia*, cannot be maintained; the usage is every where the same; and the construction of the statute will not be different, merely from a difference in the place.

It is settled, by the common law, as well as under the statute, that he who gives a new credit is bound; this is not contradicted by the doctrine laid down in *Marius;* and the case in *Lord Raym.* is corroborative. In *Marius* the money is presumed to be received at the time the note becomes due, the protest is made at the same instant, and notice of the dishonouring is given as soon as possible—so that there, undoubtedly, the indorsor is benefited by the indorsee's taking a part of the money, and runs no risque for the want of information respecting the fate of the bill, or note; but in the present case, the money was received, at least, three months before any attempt to give notice, and in the meantime the drawer became insolvent. The Court argue in *Wilson* as from a fixed principle, that the indorsee's receipt of a part from the drawer is a discharge of the indorsor for the whole; and *Strange*, tho' a *nisi prius* report, is in point in all its circumstances.

He contended, that the case cited in *Bull. L. N. P.* was in favour of the Defendant on the *second* point; for he had shewn that he might easily have been found; and where the parties reside in the same town, not a moment should elapse between the protest and the notice, *T. Rep.* 167. The *Supreme Court*, in *Steinmetz* v. *Currie** said, that in all universal questions of a mercantile nature, the *Term Reports* were to be received as authority; this was resolved, in opposition to cases for 100 years back, shewing a different practice with respect to notice; and in *Donaldson* v. *Cooper*,† the Judges refused to hear the evidence of merchants as to usage, because the point had already been determined. As, therefore, it has been settled, that reasonable notice is a question of law, and not of fact, the Plaintiff cannot now bring it into doubt and controversy.

Shippen, *President*, delivered the opinion of the Court to the following effect.

This is a motion for a nonsuit upon two grounds; *first*, that the Plaintiff by an acceptance of part of the money from the drawer of the note in question, has discharged the indorsor; and, *secondly*, that he is also discharged, because due notice of the non-payment of the note was not given to him.—It is to be observed, that with regard to discharging the parties to bills of exchange, the law makes a material difference; for, some of them can only be discharged by an express, but others may be discharged by an implied exoneration. Thus, the acceptor of the bill cannot be discharged by any construction in law; and though the holder proceeds against the indorsor, and receives part of the money from him, this will not prevent his afterwards resorting to the acceptor for payment of the balance. *Dougl.* 235. In the instance of a promissory note the drawer stands in the place of an acceptor. 2 *Wils.* 263. But an indorsor is only a security that the

* See *post.* † See also *Chapman* v. *Steinmeitz* post.

acceptor of the bill, or the drawer of the note, shall pay the money; and, therefore, if the holder is guilty of any neglect in endeavouring to recover it, that will certainly be an implied discharge of the indorsor. If, for instance, the holder takes upon himself to give further time for payment, or receives a part of the money, and gives time for the rest, the nature of the transaction is essentially changed, and the indorsor is no longer responsible. The same principle applies to the *second* point; for, if the holder of a note, without giving notice to the indorsor of its being dishonoured, retains it so long in his hands, after the day of payment, as to create a presumption that he means to take upon himself to give a new credit to the drawer, the want of notice in this case will likewise operate as a discharge. 1788.

This, however, cannot be determined in the same manner *here*, that it is in *England*. In that country, regular posts are established, the correspondence between the great commercial towns punctually maintained; and the communication, throughout the kingdom, is commodious, certain, and uninterrupted. These circumstances, therefore, render it easy to make a *general rule*; —of which the case cited for the Defendant from *Term Reports*, expressly speaks. But in *Pennsylvania* there are some roads which the posts never travel, and some seasons in which the communication, between the different parts of the State, is exceedingly difficult and precarious: How then can a *general rule* be made, so as to ascertain every where, and at all times, the reasonable time of the notice? The attempt, if not totally impracticable, would, in its consequences, be dangerous and inconvenient.

But, with regard to the particular case before us, there can be no doubt, that the right of indorsees to call upon the indorsors, must be founded upon the *custom of merchants*: for, the indorsement, considered at *common law*, amounts only to an assignment of all the property in the bill, or note, without making the assignor responsible in the event of a non-payment. How far, however, promissory notes are *in this State* upon the same footing with bills of exchange, is a question *sub judice* in the *Supreme Court*; and, therefore, it would be going out of our duty to give a decision upon it at this time.* Yet, it must be observed, that the statute of *Anne* has, in some respects been extended to this country. For, the uniform practice has been to bring actions upon promissory notes, as such; and not actions of *indebitatus assumpsit*, which was the proper action, according to the opinion of Holt, *Chief Justice*, before the passing of that statute. The Legislature, likewise, when regulating the assignment of bonds and notes, though they did not expressly put them on the same footing with bills of exchange, must, from the terms of the act, have taken it for granted, that an action might be brought upon a promissory note, considered as an instrument. 'Till, therefore, a contrary decision is pronounced, we must proceed as in the case of a bill of exchange, under the statute of *Anne*; and there it appears, that

* In the case of *M'Collough* v. *Houston*.

1788. a very trifling negligence, on the part of the holder, will operate as a discharge of the indorsor. This rule, we admit, is just and proper, when the course of trade is regular, and the communication by post is uniform and free. For, as it is usual among merchants to lend their names to one another, all faith and credit would be at an end, if the holder of a note, instead of attempting to procure the payment from the person who ought really to pay it, might, tacitly, keep it in his possession 'till the insolvency of the drawer had deprived the indorsor of his only remedy. If, therefore, he retains it two or three months, or any other unreasonable period, he ought certainly to bear the loss; and, accordingly, the law deems this the giving of a new credit to the drawer, and discharges the indorsor.

Upon the whole, the facts in the present case are strong in favour of the Defendant; but still we should be sorry to take it from the determination of the Jury, upon a question respecting the reasonableness of the notice: For, as it has been already said, it is impossible to establish a *general rule*, alike applicable to all the parts of the State; and until such a rule can be established, every case, upon its own circumstances, must be left to the Jury, as a question of fact, and not of law.*

The Jury afterwards gave a verdict for the Defendant.

* See 2 *Dall. Rep.* 158, 192.

1788.

WALTON *v.* WILLIS.

WHERE an heir at law took an intestate's lands at a valuation, it had been the practice of the *Orphans Courts* throughout the State, only to require him to give *Bonds* to those who were entitled, under the act of Assembly, to a distributive share of the estate.

The CHIEF JUSTICE said, in the course of the argument in this cause, that the practice above mentioned was ill gal and improper; for, the *Orphans Courts* ought, instead of *Bonds*, which are a mere personal security, to take *Recognizances*, by which the lands themselves would be bound for the payment of the distributive shares. He added, that the Court would not enter into a retrospect upon this subject; but that, for the future, they would expect a conformity to the opinion now given.*

HENRY Exor. *v.* RISK *et al.*

THIS was an action brought for goods sold and delivered in the city of *Philadelphia*, the Plaintiff having charged interest upon his account, after allowing six months credit. Upon the trial it was admitted, that the nett amount of the goods had been paid; and the Council on both sides agreed, that, whether the interest ought to be allowed? was the only question in the cause.

Ingersoll for the Plaintiff. A Jury may give interest, by way of damages, in an action for goods sold and delivered, when it is the agreement of the parties, when the Plaintiff has been vexatiously kept out of his money, or when it is the custom of the trade. *Doug.* 361. He then offered to prove by witnesses, that it was the custom of the trade in *Philadelphia*, to allow interest in cases similar to the present.

But by M'KEAN, *Chief Justice:* The point has been repeatedly determined otherwise in this Court, as well as in the Courts of *England;* and, therefore, witnesses cannot be admitted to contradict the established principles of the law. The case in *Douglas* is confined merely to the *American* trade. The usage has been otherwise in *Pennsylvania*, between inhabitants.

Bradford for the Defendants. Interest shall not be allowed upon an open account, for goods sold and delivered. 3 *Wils.* 206. *Jacobs's Claim v. the Estate of Adams et al. ant.* 52.

BY THE COURT.—The question is shortly this: The Plaintiff's testator having sold a considerable quantity of goods, wares, and merchandize, to the Defendants, for which the Defendants have paid the nett amount, shall interest be allowed upon the account for these goods, wares, and merchandize, without any notice to

* For the decision in the principal case, see *post.*

1788. the Defendants, that interest would be charged, or any agreement, upon their part, to pay it? If this point had not been already settled, it would nevertheless be highly inconvenient to the public welfare (which it is our duty to consider) that the Plaintiff's demand should be admitted; for, as the shopkeeper is obliged to retail his merchandize upon a credit, which sometimes terminates in a total loss, and is often unreasonably protracted by the person whom he trusts, his ruin would inevitably ensue, if, besides these disadvantages, the merchant, after a short time, could charge him with interest, the accumulation of which must, insensibly, consume the slow and precarious profits of his business. On the other hand, it is, at once, reasonable and useful, that the accounts between merchants and the retailers should be periodically settled and liquidated; and when that is done, it is easy for the creditor to take a bond, a note, or such other security as will entitle him to interest.

The case, however, does not, at this day, depend upon general arguments; the law, which we cannot alter, has been already ascertained. *Jacobs*'s *Claim* v. *the Estate of Adams and his wife* determined in this Court, has been cited for the Defendants. In that case, "one *Flower* having sold lands to *Jacobs*, died before "the purchase money was paid, or the conveyance executed. His "executors, however, received the money, and made a deed for "the land. Afterwards the will, under which the executors acted, "was set aside as having been obtained from the testator by prac- "tice and undue influence; and letters of administration being "consequently granted, the administrators, who had warned *Ja-* "*cobs* not to pay the money, instituted a suit against him and re- "covered the amount. It was, upon these circumstances, ad- "judged, that the executors should refund to *Jacobs*; but that "no interest should be allowed, because the money had been re- "ceived, as well as paid, in a mistake, and no fraud appeared "on either side." There have been many determinations in the Courts of *Pennsylvania*, and many authorities may, likewise, be collected from the *English* law books, in which the Judges have uniformly maintained, that interest shall not be allowed, upon an open account for goods sold and delivered. The case in 3 *Wils.* 205. 6. expressly recognizes this doctrine. With respect to the authority cited from *Douglas*, that evidently relates only to the *American* trade, in which it appeared to have been the usage for the merchants in *England* to allow their *American* correspondents 12 months credit, and then to charge them 5 per cent. interest; and that the *English* tradesmen, *in the same trade*, allowed the merchants 14 months credit, and then charged them a similar interest. That determination, therefore, does not interfere with the general rule; and the Court are unanimously of opinion, that the interest claimed by the Plaintiff, upon the present occasion, ought not to be allowed by the Jury.

The verdict of the Jury was conformably to this opinion.

On the meeting of the Court the next day, THE CHIEF JUSTICE observed, "That in the opinion delivered yesterday in

this cause, the Court had not relied merely on the cases decided here, but on all the cases which had been decided upon the subject, in all the Courts of *England*. These cases, although he had before generally referred to them, he now thought proper to mention particularly, that every doubt upon the question might be finally removed. In the Common Pleas, for money owing for goods sold and delivered, no interest shall be allowed. 1 *Barnes Notes* 157. 3 *Wilson* 206. *Pract. Reg. Com. Pl.* 357. In the King's Bench, interest refused upon an inland bill of exchange after acceptance, where no protest; and the Court there said, that it had never been allowed barely for money lent, without a note. *Harris* v. *Benson*, 2 *Stra.* 910. In the Court of Chancery, interest was not allowed on book and simple contract debts, &c. 3 *Rep. Chan.* 64. *Dolman* v. *Pritman.*

1788.

"Thus the concurrent practice of all the Courts in *England*, has in these cases disallowed the charge of interest; and the practice of *Pennsylvania* has been regulated by the same principles. It is not, indeed, more than four years, since in this State, on the other side of the *Susquehanna*, the Juries have been induced to allow interest, even upon notes of hand."*

WILLIAMS *v.* GEHEOGAN.

MOYLAN, in shewing cause against a rule for a special Court, at the instance of the Plaintiff, contended, *first*, that *Williams* was not within the description of the persons for whom the act provides a summary relief; and, *secondly*, that the difficulty of obtaining the Defendant's testimony at a short notice, was a sufficient reason to induce the Court to discharge the rule.

On the *first* point, it was stated, that *Williams* was not in *America* at the time when the debt was contracted, for which this action was brought; but that he came hither merely to collect the debts of a house, in which he had formerly been a partner; that, therefore, he could not claim the benefit of the act, which, it was urged, extended only to foreigners, who came to this country in the way of trade, who resided here while their merchandize was sold, and who were not punctually paid at the expiration of the credit which they gave. 3 *St. Laws*, 31. *Lewis* v. *Turner*, in the *Common Pleas* of *Philadelphia*, was cited. The Plaintiff in that case was a resident of *New-York*, and came to *Philadelphia* merely to sue, and recover from the Defendant. The Court determined that he was not entitled to a special Court; and SHIPPEN, *President*, said, that a citizen of the *United States* was not a foreigner in *Pennsylvania*.

On the *second* point, it was observed, that the Defendant being sued as supercargo, it would be incumbent on him to state all the accounts of the vessel in question; that he was at this time in *Charleston, South Carolina*, having in his possession all the documents and vouchers necessary to his defence; that he had always expressed a determination to attend the trial of the cause, and

* See *post. Rapelje et al.* v. *Emory*, and the cases there cited in a note.

1788. that his absence could not be long protracted, as the special bail had sent a bail-piece and power of attorney to take the Defendant, and surrender him in this Court.

Coulthurst, for the Plaintiff, said, that the debt was contracted in *Philadelphia*, and was there due and payable from the Defendant to the *Plaintiff*; that *Williams* came hither to pay the debts of the company, as well as to collect their credits; that he was a foreigner, in the strongest meaning of the word, and, consequently, could not be affected by the case of *Lewis* v. *Turner*, which was decided on the ground of the party's being a citizen.

With respect to the accounts, he endeavoured to shew from the cause of action, that they could not be material to the defence on this occasion; and contended, that the Defendant's absence was no reason to defeat the Plaintiff's claim to the benefit of the act.

M'KEAN, *Chief Justice*.—The act seems to be intended for the benefit of every man, whether an inhabitant, or a foreigner, who is about to leave the State; and the Plaintiff is clearly within the description of persons entitled to a special Court. But, we think, for the second reason which has been urged by the Defendant's Council, that it would be doing manifest injustice to hurry the trial on at this time: Therefore,

BY THE COURT; Let the rule be discharged.

GUTHRIE Assignee *v.* WHITE.

A *Certiorari* was issued to *John Culbertson*, *Esq.* one of the Justices for the county of *Chester*, to remove the proceedings in this cause; and the record being accordingly returned, it appeared that one *Irwin*, having maintained the Defendant's daughter for several weeks, made out an account against him, and, after swearing to the truth and justice of its contents, he assigned all his right, title, and interest therein to the Plaintiff. The debt being under ten pounds, the Plaintiff, *in his own name*, sued the father before the Justice upon this assignment, and obtained a judgment and execution against him; although, as it was stated in the Defendant's deposition, his daughter was of *full age* at the time of contracting the debt, and *no assumption*, upon his part, had been proved or suggested.

Bradford moved to reverse the Judgment; 1st, on account of the general irregularity of the proceedings; and 2dly, Because an action could not be maintained, by the assignee of a simple contract debt, *in his own name*.

THE COURT considered the whole proceedings to have been irregular; but said, that there could be no doubt of the sufficiency of the *second* reason alone, as a ground for setting them aside. And the Judgment was accordingly reversed.

1788.

TILLIER *v.* WHITEHEAD.

THIS was a feigned issue to try, whether the Defendant had a legal authority to use the Plaintiff's name in the acceptance, drawing, and indorsement of bills of exchange, and promissory notes. The case was this: *Rudolph Tillier* and *Clement Biddle* entered into articles of agreement on the 30th of *January* 1783, by which a *special* partnership was established between them. The Defendant *Whitehead* was employed as a clerk by *Biddle* in his general transactions; and a memorandum, written and subscribed by *Biddle* alone, under two firms, that is, "*Clement Biddle and Co.*" and also "*Clement Biddle and Co. and Rudolph Tillier*," was lodged in the bank; declaring that *Whitehead*'s acceptances, indorsements, and drafts under those firms, were good and binding on the parties. It appeared, accordingly, that *Whitehead*, as well as *Biddle*, had used the firm of "*Clement Biddle and Co. and Rudolph Tillier*;" and an advertisement, subscribed and published by *Tillier* himself, was read, in which notice was given, that "he had no connection with any other mercantile house, except that known under the firm of "*Clement Biddle and Co. and Rudolph Tillier*." There was not any proof, however, that *Tillier* knew of the authority which had been left by *Biddle* at the bank; but a clerk of the bank proved that he had presented notes drawn by *Whitehead* in the firm of "*Clement Biddle and Co. and Rudolph Tillier*," and that on such occasions *Tillier* referred him to *Whitehead* for payment. It appeared also that *Whitehead* had received the proceeds of some damaged tea which *Tillier* had sent to the city auction, giving a receipt in the name of "*Clement Biddle and Co. and Rudolph Tillier*;" that, in consequence of this, *Tillier* directed his clerk to forbid *Whitehead*'s meddling with any more of his money; and that sometime afterwards, *Tillier* desired *Whitehead* to quit his counting house, declaring that he had nothing to do with him.

Two questions were stated for the Plaintiff—1st, Whether *Clement Biddle* and *Rudolph Tillier* were partners generally, or only for certain specific purpose? and 2dly, Whether one partner can devolve over the right of using the firm, without the knowledge and concurrence of the other?

To the *first* question it was answered by the Defendant's Council, and allowed BY THE COURT, that the articles of Co-partnership, being *res inter alios acta*, the limitations could not be known, and, therefore, ought not to affect the Defendant, if he acted under a legal authority.

With respect to the *second* question, it was unanimously resolved BY THE COURT, that one, of two partners, may give an authority to a clerk under the firm of the house; and that the clerk may, in consequence thereof, accept bills, and sign, or indorse notes, in the name of the company. And it was said by M'KEAN, *Chief Justice*, that this case could not be properly compared with

1788. the case of an attorney without power of substitution; for, the attorney cannot exceed the letter of his authority, being nothing more than an agent himself. But each partner is a principal; and it is implied in the very nature of their connection, that each has a right to depute and appoint a clerk to act for both, in matters relative to their joint interest.

Verdict for the Defendant.

Ingersoll for the Plaintiff—*Bradford* for the Defendant.

STEINMETZ *et al.* v. CURRIE.

THIS action, brought by the indorsees of a bill of exchange, against one of the indorsors, now came on for a *second* trial.* It was very ably discussed by *Ingersoll* for the Plaintiff, and *Sergeant* and *Bradford* for the Defendant; but, as the circumstances and principles of the case, are accurately preserved in the charge of the Court, it is unnecessary to give any other statement of the facts or arguments, than that delivered by the CHIEF JUSTICE.

M'KEAN, *Chief Justice*.—This is an action of very considerable importance, not only as it affects the present parties but as it affects every holder, drawer, or indorsor of a bill of exchange. The honour and justice of the State are, indeed, likewise interested, that the decision should be conformably to the general mercantile law of nations, lest a deviation should be imputed to our ignorance, or disrespect, of what is right and proper. It should be remembered too, that the Defendant is a stranger, and that the event of this suit can be no further obligatory elsewhere, than as it corresponds with the universal and established usage of all countries; for, upon the present question, *that*, and not the local regulations of *Pennsylvania*, must furnish the rule of determination.

It appears, then, that one *Whitelaw*, on the 30th of *October*, 1775, drew a bill of exchange for £. 339 18 sterling, upon *William Houston*, malster, *and Co.* in *Refrew*, near *Glasgow*, in favour of *James Witherspoon*, or order, and payable on the 1st day of *August*, 1776. This bill, afterwards, but it is not certain at what period, *Witherspoon* indorsed to *Currie* the Defendant, who sometime in the year 1777 indorsed it to Messrs. *Archibald and John Blair*, and those gentlemen, before the month of *October*, 1778, indorsed it to *John Pringle*, by whose subsequent indorsement, it became the property of *Steinmetz and Bell*, the Plaintiffs in this cause. It appears further, that *Steinmetz and Bell* on the 19*th* of *October*, 1778, indorsed the bill of exchange to Mr. *Freeman*, who is now dead, and by whom, in his life time, it was transmitted to *William Cowpland* of *London*. The bill seems to have been speedily and regularly indorsed after it came into the hands of the Plaintiffs; and *Cowpland*, having duly received it from Mr. *Freeman*, demanded payment of the persons upon whom it was drawn on the 30th of *December*, 1778, when it was protested on account of their refusal, for which they assigned

* See *ant.* 234.

reasons, that can have no effect or relation to the cause. The notice of this protest was received by *Freeman*'s executor, *William Sitgreaves*, on the 13th of *April*, 1780, and he gave notice to Messrs. *Steinmetz and Bell* on the 28th of the same month; but those gentlemen did not until the 16th of *October* 1782, give any notice to *Currie*, the Defendant, who was arrested the day following to answer in this action. 1788.

These are the material facts; and, on them, we are not to enquire, how it happened that the bill lay three years, from the time of drawing to the time of protesting it: for, as between indorsor and indorsee, every indorsor is considered as a new drawer. The defence, however, is on this single point, that the Plaintiffs had notice on the 28th of *April* 1780, and yet gave none to the Defendant until the 17*th* of *October* 1782, a period of two years and a half, except twelve days. Whether that was a reasonable time, will depend upon the circumstances of the case. It appears that the Plaintiff lived in *Philadelphia*, and the Defendant, when he sold the bill, lived at *Fishkill* in the state of *New-York*, about 130 miles off. This, in point of distance, is not so great, but that he might have been found, or, at least, some enquiry made after him, much sooner. We are, therefore, unanimously of opinion, that the delay has been unreasonable; but if they have satisfactorily accounted to the Jury for that delay, their verdict will be in favour of the Plaintiffs. Were it, however, before us, on a special verdict, we should certainly determine, that it is an unreasonable time.

It is alleged, that the difficulties of the war prevented the giving notice, and that the Plaintiffs could not bring their action until they were in possession of the bill. But is that true? Could not notice be given, notwithstanding the war? They saw the bill and protest in the hands of *Sitgreaves*, and they knew they became responsible. It was, therefore, their duty to provide for their indemnification and to give immediate notice. Nor could there be any great difficulty in finding the Defendant, for he appears to have been a man of note, in extensive business, and dealt, at that very time, with *Pringle*, another indorsor of the bill, who lived in *Philadelphia*, and from whom information might have been obtained. There is, perhaps, an honest and a reasonable ground for not giving notice until after the 20th of *May*, 1780, lest the money should be paid in depreciated paper. But two years more elapsed, when that danger was over, by the extinguishment of continental money.

It has been said, likewise, that when the drawer has no effects in hands, no notice is necessary; but it has been determined otherwise, as between indorsor and indorsee, upon the clearest principles. What is it to the indorsee whether the drawer has effects or not? Every indorsor is in law a new drawer, and he may be compelled to pay a bill, even where the name of the drawer has been forged. Every day's experience shews that bills are taken on the credit of the indorsor alone—sometimes when the

1788. drawer is totally unknown. Nor can it be alleged, that no injury has been sustained, since in the course of things, all the prior indorsors might have failed.

Upon the whole, we think the strength of the evidence is against the Plaintiffs; and if the Jury are of the same opinion, they will find a verdict accordingly. But if, on the contrary, they are satisfied with the reasons given for not making an earlier demand, they will find for them.

The opinion of the Court being so unfavourable to the Plaintiffs, they voluntarily suffered a nonsuit, when the Jury were at the bar ready to return their verdict.

In the course of the trial, the Plaintiffs offered *John Pringle*, (their immediate preceding indorsor) as a witness; and, in order to do away his interest in the action, they proposed striking his name off the *first* and *third* bills of the set; which were the only bills in their possession, the *second*, on which the protest was made, being as they alleged, lost in its passage from *England* to *America*.

It was objected by the Defendant, that *Pringle*'s name would still remain upon the *second* bill (which, for any thing that appeared to the contrary, might be in the hands of a third person) and on the records of the notary, who made the protest; so that he could not be effectually discharged in the way proposed.

To this, the Plaintiff's Council replied, that, where there are several securities for the same thing, a discharge of one is a discharge of the whole; and they instanced the case of a captain of a ship, who usually signs three bills of lading, of the same tenor and date.

But, BY THE COURT.—In that case, if the captain takes a receipt, he would certainly be discharged. In the instance before us, however, the *second* bill may be in the possession of a *bona fide* purchaser, who will be entitled to sue *Pringle* upon it, notwithstanding any act of the Plaintiffs on this occasion. We are of opinion that *Pringle* is clearly interested in the cause, and, therefore, inadmissible as a witness.

It was suggested, that if the Plaintiffs executed a release to *Pringle*, he might be made a witness; but *Ingersoll*, doubting whether a release to one indorsor would not be a release to all, did not chuse to adopt this measure.

It was also ruled, in this cause, that the case in *Term Reports*, being a determination upon general mercantile law, was of authority here; and that it would have been so, if it had been determined in *France*, *Spain*, or *Holland*, as well as in *England*.

MIFFLIN et al. *v.* BINGHAM.

THE Plaintiffs, being disappointed in their evidence, voluntarily suffered a nonsuit. The following points, however, were resolved in the course of the trial; to illustrate which, it is necessary to relate the leading circumstances of the case.—The

Plaintiffs were owners of a privateer called the *Rattlesnake*, commanded by Captain *M'Cullough*. This privateer, having taken a valuable prize, during the late war with *Great-Britain*, carried her into *Martinique*, where the Defendant resided as agent for the *United States*. At the time of her arrival, the Defendant was exceedingly embarrassed on account of certain pecuniary engagements, which he had entered into for the public; and, in order to relieve himself, he applied to captain *M'Cullough* for the use of the proceeds of the prize, offering to pay the amount by bills of exchange, drawn on his correspondents in *Philadelphia*. To this proposal *M'Cullough* agreed; and, on delivering to the Defendant the portion of the prize that belonged to the owners, the bills of exchange were drawn, and regularly accepted; but when they became due, they were paid in continental money, which, at that time, had depreciated to the rate of three paper dollars for one hard dollar. The Plaintiffs, at first, believing this transaction, between *M'Cullough* and the Defendant, to have been on a public foundation, did not complain of the loss which it occasioned; but settled with the captain and crew for their respective shares of the prize, and allowed the bills of exchange, in *M'Cullough*'s accounts, as a specie charge. Afterwards, however, it was suggested to them, that the whole was a private speculation for the Defendant's emolument; and that no part of their funds, which had been thus transferred to him, was carried into his accounts with the *United States*. Under this persuasion they brought the present action, to recover the difference between the value of their effects put into the hands of the Defendant, and the depreciated amount of the continental money, in which the bills of exchange were paid;—alleging that those effects had been obtained from *M'Cullough* under false pretences. 1788.

I. The principal witness for the Plaintiffs, was *M'Cullough*, and, in hopes, at all events, to secure his testimony (as he was about to sail on a distant voyage) a rule had been obtained for taking the depositions of going witnesses, upon the usual terms, and subject to all legal exceptions. Under this rule, *M'Cullough* was, accordingly, examined by the Plaintiffs, and cross-examined by the Defendant; and his deposition, thus taken, was offered to be read upon the trial.

But two objections were made:—1st. That *M'Cullough* was interested in the event of the cause, and, therefore, inadmissible as a witness, even if he were present: and 2d. That no *subpœna* had issued to procure his personal attendance at the trial.

1. To the *first* objection, it was answered *by the Plaintiffs*, that it would appear by *M'Cullough*'s cross examination, that he, as well as the whole crew, had been fully satisfied for their respective shares of the prize money, and, consequently, that he was not interested in the fate of this action. It was urged that the effects delivered to the Defendant, were not delivered on *M'Cullough*'s account, but on the account of the owners of the privateer, as their appropriated part of the prize; that, therefore, having sustained no loss, he would not be entitled to any retribution;

1788. and that, in fact, the only question arising from the transaction at *Martinique*, now lay exclusively between the Plaintiffs and the Defendant, whether the former should receive from the latter a compensation, equivalent to the loss on the bills of exchange.—But it was insisted, that, at all events, this objection came too late, as the Defendant had cross-examined *M'Cullough* under the rule; which, having the same effect as if he had been cross examined in Court when sworn in chief, precluded every subsequent objection to his competency; and that his deposition must indeed be considered, from the nature of the questions asked on the cross-examination, as tantamount to a denial of interest on his *voir dire*. 4 *Burr.* 2251.

2d. On the *second* objection the evidence was, that, though *M'Cullough* had left *Philadelphia*, he had not sailed from *Marcus Hook*, on the *Sunday* preceding the day of trial (*Wednesday*) nor was it certain that he had even yet taken his departure from that place. But it appeared that the Plaintiff, although he had not issued a *Subpœna* himself, had given notice to the Defendant of the intention of the witness to sail, in order that he might issue a *Subpœna*, if he preferred *M'Cullough*'s *viva voce* testimony on the trial, to the deposition under the rule.—The *Plaintiff* contended, therefore, that there was no reason to suppose that he wished to avoid *M'Cullough*'s evidence delivered and canvassed in the most open manner; that the spirit of the rule had been complied with, by putting it into the power of the Defendant to secure the personal attendance of the witness; that it would be absurd to require a *Subpœna* to be issued in all cases; as, for instance, where the absence of the witness was a matter of notoriety; and that, in the present case, if a *Subpœna* had been served, *M'Cullough* must either have brought himself into a contempt of the Court, by disobeying its process; or have run the risque of ruin, by delaying his voyage.

1. In support of the *first* objection, the *Defendant*'s Council contended, that *M'Cullough*, being once interested in the proceeds of the prize, it was not enough to shew that he had been satisfied, but the Plaintiffs must produce a release. 2 *Atk.* 15. It was urged, that, in order to perfect every appropriation of joint effects, the consent of both parties is necessary; that, in this case, it did not appear that the Plaintiffs ever consented to the transaction, and, consequently, *M'Cullough* still retained the share in the effects delivered to the Defendant, to which he was originally entitled as a captain of the privateer. If then a recovery takes place in the present action, *M'Cullough* may hereafter sue the Plaintiffs to compel them to pay over his share of the money recovered; and, therefore, his testimony is within the principle of 5 *Burr.* 2727. where one insurer was declared to be an incompetent witness in an action on the policy, because he could compel the other insurers to contribute. Nor is the objection too late. Depositions in chancery are always taken *de bene esse*. When *M'Cullough* was examined, no Court was sitting that could pronounce upon his competency; and the adverse doctrine would involve the Defendant in this dilemma, that if he did not examine,

he lost all the benefit of the testimony, and if he did examine, he forfeited all right of exception to the competency of the witness. There is not, therefore, any similitude between a cross-examination under such circumstances, and the *voir dire*, which is a mere preliminary enquiry; whereas, it appears, that the witness had undergone a long examination on the part of the Plaintiffs, before the Defendant proposed a single question to him. 1788.

2. In support of the *second* objection, the *Defendant*'s Council referred to the rules, *tit. Witness, No.* 48; and insisted that these being *literæ scriptæ* to govern the practice of the Courts, it was incumbent upon the Plaintiffs to prove the service of a *Subpœna*, or, at least, a reasonable endeavour to serve it. The greater satisfaction and justice to be obtained from *viva voce* testimony formed the reason of the rule; and this, it was urged, is of such weight, that the common law never admits depositions to be read, but in cases of absolute necessity. If then a *Subpœna* had been taken out a week ago, is there any ground to assert, that the witness, whose family resides here, would not have attended; or that the sailing of the vessel (which may at this moment be anchored within twenty miles of *Philadelphia*) could not be safely postponed? Where then is the absolute necessity to which the common law yields the wholesome rigour of its rules? It is said, that it would have been ruinous to *M'Cullough* if he had been detained: but this is a matter of which the Plaintiffs had no right to judge; the witness, in the first instance, and the Court eventually, were only competent to determine it; and, after all, the service of a *Subpœna* does not compel an attendance, but only requires that a sufficient cause should be shewn, why the party did not attend. Suppose the deposition had not been taken, and the Plaintiffs had moved to put off the trial on account of *M'Cullough*'s absence, would not the Court have said then, that they were not entitled to the delay, as the witness was here a few days ago, and they had not pursued any legal steps to obtain his evidence? Is there not as much propriety in saying so now?—for it is idle to rely upon the notice of *M'Cullough*'s intention to sail, since the Plaintiffs had the same opportunity of detaining the witness which was given to the Defendant; and the latter would have been absurdly officious indeed, if he had taken it upon him to *subpœna* his adversary's witness.

M'Kean, *Chief Justice*.—There are two ways of proving a witness to be interested in a cause:—first, by examining him on his *voir dire*; or, secondly, by shewing his interest from other evidence, either parol or written. But both these ways cannot be pursued at the same time; for the election of the one conclusively bars any subsequent recourse to the other. The Defendant's cross-examination under the rule in this case, is not, however, upon the same footing with an examination upon the *voir dire*; and, therefore, we do not think that he is now precluded from the advantage of any legal exception to the competency of the witness.

1788. With respect to the admission of testimony, the law has been so well established, and is so perfectly understood, that it is needless to enter minutely into the doctrine. The whole, indeed, may be reduced to a short rule; if the witness speaks under an *interest*, it is fatal to his competency; if he is liable to an *influence*, it taints his credibility. On the present occasion, we are of opinion that captain *M'Cullough*, at the time of taking the deposition, was not an interested witness; and, therefore, if there was no other objection, we should certainly allow the Plaintiffs the benefit of his testimony: For, in the authority cited from *Atk.* 15. Lord *Hardwicke* can only mean, that a witness, who has been once interested, shall be presumed to be so still, unless the contrary is proved by a release, or other satisfactory evidence.

The Plaintiffs, however, have failed in another respect. A *Subpœna* ought certainly to have been taken out, and, if possible, served upon the witness; for, it was his, and not their province, to determine whether he would attend or not. The rule never was meant, indeed, to direct an useless thing;—such as issuing a *Subpœna* for a witness actually residing in *London*, or any other distant country; though even this was heretofore required in strict practice. But, in the present instance, captain *M'Cullough* was known to be here a few days ago, his family always resides here, and he may himself, probably, be within a very short distance of the city, at this moment. The Plaintiffs having taken it upon themselves, not only to decide for the witness, that he would not attend, but also for the Court, that they would not insist upon the rule, have acted in their own wrong; and, upon this objection, we are of opinion, that the deposition ought not to be read in evidence.

II. The Defendant's Council offered his books to prove, that in his account with the *United States*, at the time of the transaction between him and *M'Cullough*, there was a considerable balance in his favour.

But it was objected, for the Plaintiffs, that the books of a party are only evidence of goods sold and delivered, or work done; and that, therefore, they were inadmissible to the present purpose, which was to shew that the money was advanced upon a contract different from that which the Plaintiffs alleged.

To this it was answered, that although the books of a party are only evidence to charge in the cases mentioned, yet, that they might well be received to establish a matter collateral to the cause.

And by M'Kean, *Chief Justice*.—This is a point, that I do not remember to have ever occurred before. The books are not offered to prove a charge against the Plaintiffs, but only to determine a collateral question, whether a third person was the Defendant's debtor, at a particular period? How can this be accomplished, but by the evidence of the books, fairly and regularly kept? To make it a charge, other vouchers of the entry might be

necessary; but for this purpose, if it is of any importance to the cause, (which I do not think) I can conceive no other mode of proceeding. 1788.

The Defendant, thinking, however, that he could accomplish his object in another way, did not call for a decision of the Court; but waved the reading of the books.

For the Plaintiffs—*Ingersol* and *Sergeant*.

For the Defendant—*Tilghman*, *Lewis*, and *Wilson*.

High Court of Errors and Appeals of Pennsylvania:

April Sessions, 1788.

LEWIS, Appellant, *v.* MARIS, Appellee.

THIS was an appeal from the decree of the register of wills, and two Justices of the *Court* of *Common Pleas* of the county of *Montgomery*, who admitted an instrument bearing date the 25th of the tenth Month, 1786, purporting to be the last will and testament of one *Jephtha Lewis*, the father of the Appellant, to be proved as a good will and testament in writing, although it had neither been written nor subscribed, by the supposed testator, upon the deposition of *John Evans*, a scrivener, that it was drawn at his request, and conformably to his instructions, but never read to him after it was written. This instrument contained a devise of real estate, and a legacy of £.400. for the use of a school, in the township of *Gwyned*, and county of *Montgomery;* and upon the validity of that legacy the present controversy arose.—It was proved by several persons, that the deceased, in the year 1784, had talked of leaving money to a school; that about three months before his death, he asked one of the deponents to be a trustee for that purpose; that some months before his death he remarked to another, what better could a man do with his money than to leave it to such a use? that he declared he did not intend all his estate for his child; that he spoke repeatedly of *John Evans*'s making his will; that for fear it should come to the knowledge of his family, he desired it to be left with *John Evans;* that being indisposed when it was drawn, he desired *John Evans* to call upon him again with it; that when *John Evans* called with it again, he was too far gone to read and attend to it; and that the disposition of the *real estate* contained in the paper produced, was the same which the deceased had, before his death, desired

his brother to mention to *John Evans:* But *John Evans* was the *only witness* who proved any instructions to have been given in respect to the *legacy* of £.400.—It appeared, likewise, that the same scrivener had drawn another will for the deceased in the year 1779, which was left in similar circumstances, without the subscription of the testator, or any other attestation than that of the drawer; but this circumstance was made no use of in the argument. 1788.

Wilcocks and *W. M. Smith* for the Appellants.—We contend 1st, That there is only *one witness* to prove the instrument in question; and, 2dly, That *two witnesses* are indispensably necessary to the legal establishment of a last will and testament.

I. The *first* point, arising from the facts, must be determined by the depositions; and, as no regard can be paid to a recital of the loose expressions which were used by the supposed testator, antecedent to the instructions for drawing his will, it is clear, that the only evidence to support the legacy in favour of the school, must be founded upon the deposition of *John Evans*, to whom those instructions were given.

II. We shall proceed then, to consider the *second* point, which depends upon the construction of the act of Assembly, passed in the year 1705, "concerning the probates of written and noncupative wills, and for confirming devises of lands." It is there said, "that all wills in writing, wherein, or whereby any lands, tene- "ments, or hereditaments, within this province, have been, are, "or shall be devised *(being proved by two or more credible wit- "nesses, upon their solemn affirmation,* OR BY OTHER LEGAL PROOF "IN THIS PROVINCE, *&c.)* shall be good and available in law, for "the granting, conveying, and assuring of the lands, or heredita- "ments, thereby given, or devised, as well as of the goods and "chattels thereby bequeathed." 1 *State Laws*, 30. The question, therefore, rests upon the meaning of the words, *or other legal proof in this province;* and, in order to ascertain that, it may be proper to take a short, retrospective view of the general doctrine, respecting the legal attestation of wills and testaments. As the probate of wills was not a matter originally of common law jurisdiction, the decisions have necessarily been drawn from the civil law, the ecclesiastical law, and the law of nations, engrafted upon the general customs of the realm of *England*. By the civil law, indeed, seven witnesses were required; but this excess being reformed, first by the ecclesiastical law, which required three witnesses in some cases, and only two in others, and then by the general customs of the kingdom, it is settled in the most authoritative books to be sufficient, that the will and mind of the testator should appear by two competent and disinterested witnesses. *Swinb.* 5. 6. 45. 46. 3 *Salk.* 396. For, the general customs of the kingdom are not further controlled, than by the *jus gentium*, which is likewise satisfied with the attestation of two witnesses. *Swinb.* 47. *God. Orph. Leg.* 3. 8. 10. and where, indeed, the disposition is for *pious uses*, the canon law, in this respect, corresponds with the *jus gentium*, although for *secular purposes*, it still requires two

1788. witnesses, one of whom must be the minister. *God. Orph. Leg.* 8. 10. In the case of Codicils, the civil law required only five witnesses, but the law of *England* requires the same proof, as in the case of testaments, that is two witnesses. *id.* 20. Two witnesses, therefore, are *sufficient*, and regularly two witnesses are also *necessary* to the legal proof of a last will and testament. *Swinb.* 343. 1 *Equity*, *Abr.* 5 *Bec. Tit. Test.* and it may be vain to have no more than one. *Swinb.* 65. Where children have been considered as incompetent witnesses to their father's will, a child, being the third witness, was adjudged as none, and the will set aside. 1 *P. Wms.* 10. 267. *S. P.* and the necessity of two witnesses to a will, is an idea as ancient as the time of *Glanvil. Glan. b.* 7. *c.* 5. Nor does a prohibition lie to the ecclesiastical Court, for refusing, by one witness, to establish a testamentary writing. *God. Orph. Leg.* 66. 2 *Burn. Ecc. Law*, 243. 2 *Salk* 547. *L. Raym.* 220. It is certain, that the statute of frauds has not made any alteration in respect to written testaments of goods and chattels; and one witness, by the civil law, being as no witness at all, the proof of such a testament can only be made by two sufficient witnesses, 2 *Burn. Eccl. Law*, 524.

It is true, that we have produced no adjudged case, under the 32 *Hen.* 8. *c.* 1. shewing that two witnesses are necessary to establish a will of *real* estate; but we have cited so many authorities of a date subsequent to the statute, which, in this point, make no discrimination between wills of lands, and testaments of chattels, that it may be fairly inferred that the rule of proof, founded upon the *jus gentium* and the general customs of *England*, is alike applicable to every species of testamentary writing. For the cause of the appellant, however, it is sufficient, that no doubt can remain of its strict and invariable application, in the case of testaments for the disposition of personal property; and, being thus incontrovertibly established in that country, from which we have, in general, copied the principles and practice of jurisprudence, it will appear by various acts of the Legislature, antecedent to the passing of the law in question, and even by the original stipulations in *England*, that the necessity of two witnesses to the legal probate of a last will and testament, has been expressly recognized and adopted in *Pennsylvania*. Thus, among the laws agreed upon in *England*, it is provided, that "all wills and writings, attested "by two witnesses, shall be of the same force as to lands, as other "conveyances, &c." *Prov. Law. in App. p.* 4. *art.* 15. From which it seems to have been the intention of the *Proprietary* and first emigrants, to obviate every doubt, and, unequivocally, to place the proof of wills of lands, upon the same footing with the proof of testaments of chattels; and this stipulation was formally enacted into a law, soon after the meeting of the General Assembly of the Province. *Ibid. p.* 7. *c.* 45. The law enabling foreigners to devise lands, likewise makes two witnesses necessary to the will.* *Prov. Laws. vol.* 2. *p.* 109. *old Edit.* Nay, the Legis-

* 2d Vol. Ap. page 109.—This act of Assembly requires two or more subscribing witnesses.

lature, at that day, carried the matter so far as to require the testimony of two witnesses in all cases. *Prov. Laws. in app. p.* 3. *c.* 36. Is it not, therefore, unreasonable to suppose, that it was intended, by the act of 1705, to relax the rules of proof on a subject of so much solemnity and importance, as a last will and testament?—and, more especially, when by the same law, *Sect.* 6, it is declared, that no will in writing, concerning any goods and chattels, or personal estate, shall be repealed by word of mouth only, nor shall any nuncupative will be established, but upon the testimony of two, or more, witnesses? *Sect.* 3. 1788.

This act then must have proceeded upon the well known principles and decisions respecting probates; and the construction ought to be such, that no word should be rendered void, superfluous, or insignificant. Hence, by the words, *or other legal proof*, the proof meant by the Legislature, must be that, which the pre-existing laws and customs of *England*, had made necessary to a last will and testament, and not merely that, which is sufficient to convict a man of an offence, or to charge him with a debt: for, if this were not the meaning, it would be superfluous to say, that the probate shall be by *two*, *or more*, *credible witnesses*, *upon their solemn affirmation*, or *by other legal proof*, since the latter sentence would naturally comprehend and supersede the former. Such, indeed, has been the interpretation of the *Register*'s *Court* of *Pennsylvania*, previously to the revolution, by the decree of a gentleman of great professional abilities. *Wm. West*'s *case before the Register General of Pennsylvania*, *in* 1773.

But, when we consider the religious delicacy of those persons, who chiefly composed the Legislative body when the act was passed, may we not presume that this mode of expression has been used, in order, on the one hand, to assert the right of giving testimony upon *solemn affirmation*; and, on the other, to avoid the direct mention of testimony upon *oath*? This conjecture is, in some degree, supported by the circuitous manner in which many other acts of Assembly prescribe the forms of proof; *Prov. Law*, 2. 3. 4. 5. 5. 6. 20. 24. 25. 37. 37. 37. 42. 45. 45. for, the first time that an attestation upon *oath* is expressly mentioned, occurs in the year 1715, ten years after the passing of the law in question. *Ibid.* 76.

If, then, laws which relate to the same subject, must be taken together, there can be no doubt from a connected view of the laws of *England*, the acts of Assembly cited from the appendix of the late province laws, the different parts of the very act in question, and the practice of our Courts, that, whether qualified by *affirmation*, or by *oath*, two witnesses are necessary to establish a last will and testament, and without *two* there can be no *legal proof*. The witnesses, we admit, need not be present at the actual execution of the instrument: but, if it is written by the testator himself, two witnesses must, at least, prove his hand writing; and if it be written by another person, two witnesses must prove that it contains his last will and disposition.

1788. *Lewis* and *Lawrence*, for the Appellee.—The Appellant in contravention of his father's wishes and benevolence, endeavours to set aside the will, in order to defeat the charitable donation which it contains: Should there be a doubt, therefore, upon the subject, it will operate against so ungracious an attempt; but we conceive that the strict principles of law will be a sufficient prevention. Before the statute of wills, 32 *Hen.* 8. *c.* 1. every man was at liberty to dispose of his personal estate; and as the disposition was, in that respect, governed by the civil and ecclesiastical laws, according to their institutions, two witnesses were necessary to the probate of every testament.

But when a statute, without saying any thing about the proof, gives a new power to devise, unknown in the civil and ecclesiastical codes, shall we resort to them, instead of the common law, to ascertain, in what form, and by what number of witnesses, the exercise of that power ought to be attested? This would surely be an absurd and improper deviation, since the Courts of civil and ecclesiastical law can only interpose with respect to testaments of chattels, and cannot take cognizance of wills for the conveyance of lands. It may, indeed, seem strange, that two witnesses should ever have been requisite to the former, and only one to the latter: but they are matters not regulated by the same Legislature; so that when the parliament, authorizing a devise, requires two witnesses to prove it, this is not done because, in similar cases, the civil law requires a similar attestation, but on account of the fitness and expediency of the thing itself.

It is true, however, that, as on the other side it has not been shewn that *two* witnesses are *necessary*, neither have we been able to discover a case, in which it is expressly adjudged, that, under the statute of 32 *Hen.* 8. *c.* 1. *one* witness is *sufficient* to establish a will of lands: but, as all the authorities and abridgments that have been produced, refer exclusively to the case of a testament of chattels, and are uniformly silent with respect to the disposition of real estate, it is evident that the writers regarded the separate jurisdictions, to which these testamentary instruments respectively belonged, and were aware of the different degrees of proof, upon which their authenticity depended. Besides the cases that have been already cited for the Appellant (which merely state, with some variations, that a notary having received instructions for drawing a will, and having accordingly drawn it, did not arrive 'till the party was dead) there are many others of a similar description. *Vin. tit. Devise, pa.* 117. *pl.* 2. 4. 5. 6. 14. 15. *pa.* 123. *pl.* 9. *pa.* 122. *pl.* 3. But, in this long catalogue, not a word is said to shew, that *two* witnesses were present at the execution of the will, or heard the instructions which were given for drawing it. Nay, in an action brought by an heir at law against a devisee, we find that the instructions for drawing the will were given to an individual, and there is not the least intimation of another witness being present at any part of the transaction. *Swinb.* 56. Thus, likewise, when a man desired another

to write his will, who accordingly took short notes at the time, went home, and reduced them into form, but did not return 'till the testator was dead, this nevertheless was adjudged to be a good will within the statute, *Swinb.* 6. and even where the notes were not reduced to form, 'till after the testator's death, the will was established. *Swinb.* 51. 56. 113. *Cro. E.* 100. For, the principle is explicitly laid down in *Blackstone*, that "as to written wills they need not any witness of their publication, &c. A testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good: And though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate." 2 *Black Com.* 501. 1788.

The cases that are regulated by the statute of frauds, 29 *Car.* 2. *c.* 3. are clearly of no authority here; but those which have been determined under the statute of 32 *Hen.* 8. *c.* 1. are applicable to the act of Assembly, and ought to govern in the exposition. By this statute, no proof of signing and attesting is prescribed, and, therefore, before the passing of the act in question, though two witnesses were necessary to prove a testament of chattels, one was sufficient, in *Pennsylvania*, to establish a will of lands. What then is the change introduced by the Legislature? In the construction of statutes, every part must receive effect; for, it cannot be presumed that unnecessary words have been used; *Cowp.* 558. and, in order to give effect to every part, it is natural to enquire what was the subject under consideration, and what were the objects and intentions of those who framed the law? When, therefore, the Legislature was considering by what proof wills and testaments ought to be established, we may reasonably presume that they took into contemplation the general principles of evidence, and finding that presumptive proof, or in other words, such circumstantial testimony as satisfied the mind, was sufficient in every other instance, whether on a question of property or of life, might they not ask, why it should be rejected here? and, if a competent answer were wanting (as it certainly must be) would they not wisely resolve to destroy a distinction, for which there exists no solid foundation in reason, or the nature of things? The Legislature then, not implicitly adhering to the civil or ecclesiastical institutions, and placing the probate of wills of lands, and of testaments of chattels, upon the same footing, have, in effect, declared that those instruments shall, if possible, be authenticated by *two, or more, credible witnesses on their solemn affirmation;* but, if this cannot be obtained, then, that *other legal proof*, or the same circumstantial and corroborative evidence, which decides the other most important interests of men, shall, in this case, likewise be received.

Such, we contend, was the intention of the Legislature; and what constitutes *legal proof*, it is incontrovertibly the province of the common law, and not of the civil law, to judge and determine. Let us suppose that a man directs his will to be drawn;

1788. that it is executed in the presence of the drawer, that the testator informs his friends by whom it was drawn, and that, accordingly, after his death, it is found in the hand writing of that person:—under these circumstances, the confession of the party, corresponding with the testimony of the scrivener, and corroborated by the hand writing, would certainly amount to *legal proof, at common law;* but, pursuant to the adverse doctrine, the will could not be established, for there are not two witnesses to the execution, nor to the instructions for drawing it. Again; if a man says, "my will is in a certain drawer," and, after his death, an instrument, purporting to be his will, is found in that drawer; this, likewise, would be deemed *legal proof*, and yet it wants the attestation of *two witnesses*. Or, suppose it had been said, "I am going to my notary to direct him to draw my will, and I mean to give half my estate to A, and the other half to B." if, after his death, the notary produced an instrument drawn in that manner, the circumstances of the case would furnish a *legal proof*, but still there are not *two witnesses* to the will.

If two witnesses are required in all cases, the act must be taken to intend witnesses present at the execution of the will; and so the expression *or other legal proof*, becomes insignificant and nugatory. Nor, consistently with the rules of grammar and construction, can the argument be admitted, which is founded upon the religious scruples of the Assembly that passed the act; for, if the Legislature sought to avoid the mention of an oath, the sentence must have been differently arranged, and would probably have run in this way; "wills, &c. being proved *on the solemn affirmation, or other legal proof, of two or more credible witnesses, &c.*" but, as it now stands, the Appellant's interpretation is strained and improbable; while the latitude, for which we contend, is not without precedent: for, by the statute of *James I.* the mother of a dead child, which, if it had lived would, have been a bastard, is required to give positive proof by *one witness*, at least, that it was born dead, or she shall suffer as in case of murder; yet, in trials under this law, circumstantial evidence has always been admitted here, as well as in *England*, to work an acquittal. This is, indeed, a penal statute; but there is nothing which the law regards more favourably than a last will, and Judges have ever been solicitous to support the intention of the testator.

Is there not sufficient evidence, then, that the will in dispute, contains the intention of the testator? Every part of it, except that which relates to the legacy of £. 400, is directly proved by two witnesses, the scrivener who drew it, and the testator's brother who carried the instructions; and, even with respect to the legacy, there is the positive testimony of one witness, corroborated with such circumstances as force conviction on the mind—such circumstances as ought, we say, to be received under the act of Assembly. The testator, avowing that he did not mean to leave all his estate to his children, had for years before his death uniformly declared his intention of bequeathing a legacy for the benefit of a school; and but a few days before he expired, he requested

one of the witnesses to be a Trustee for that use. When, therefore, we find the same intention expressed in the instrument produced, and the scrivener deposes that it is expressed conformably to the instructions he received, there cannot be a doubt of our being in full possession of the last will and mind of the testator. The will is, therefore, clearly established by *legal proof*, within the letter and spirit of the act; which, by thus using a comprehensive, though plain and satisfactory mode of expression, intended to obviate the many mischiefs that had arisen, from the strict rules of proof required by the civil and ecclesiastical law. 1788.

Wilcocks, in reply.—It is conceded, that, according to the law in *England*, a testament of chattels must be proved by two witnesses: but it is argued by the adverse Council, that under the statute of 32 *Hen.* 8. *c.* 1. a will of lands is sufficiently proved by one witness. In this we cannot agree; for, none of the cases, cited on the part of the Appellee, relate to the solemnities of making a will, or the degree of proof that is required: the only point agitated or determined in any of them, is, whether the instrument in question be *a good will in writing*, or not? and though there is no express adjudication upon the subject, we find it said that two witnesses are necessary to a will, saving that, *in case of land*, the solemnity of writing is *also* necessary. *Swinb.* 6. which is a strong implication in favour of the Appellant's doctrine.

But the present controversy must be decided, after all, by the act of Assembly, which was made with a full knowledge of the ideas and determinations in *England*, relative to the probate of testamentary writings; and there appears from the several prior acts of the Legislature of *Pennsylvania*, a fixed intention to adopt the practice of that country. If, indeed, by the words, *or other legal proof*, less than two witnesses were meant, this absurdity will be obvious, that in the *first* part of the sentence, we are called upon to prove the will by *two*, *or more*, credible witnesses, upon *their solemn affirmation;* and that in the *close* of it, we are allowed to make the proof by *one*, *or less than one*, witness, that is by *circumstances* which satisfy the mind; so that the words—"two or more witnesses"—are by such construction satisfied by a proof of "two or less than two witnesses." Thus, likewise, the testimony of two witnesses, or of *less than two*, *under any circumstances*, is made tantamount to the testimony of *two or more witnesses*, *upon their solemn affirmation*:—a concession which, it is not probable, a Legislature, composed of *Quakers*, would have been easily induced to make. On the contrary, the design of this clause seems to have been, to prevent any doubt of a man's right to deliver his testimony, conformably to the dictates of his conscientious scruples; and, having provided that the proof might be made by two, or more, credible witnesses, *upon their solemn affirmation*, it was necessary to proceed to admit *other legal proof;* for, if the Legislature had stopped there, an *affirmation* would be the *only form of attestation* by which a will could be established; and as the law allowed no person to affirm, who was not conscientiously scrupulous

1788. of taking an oath, it follows, generally, that none but a *Quaker* could be a witness to a will.

Certain it is, therefore, that *other legal proof* is placed in opposition to *solemn affirmation*, and not to the *number of witnesses;* and the clause, fairly construed, amounts to this, that "wills, &c. being proved by two, or more, credible witnesses, *upon their solemn affirmation*, or by two or more credible witnesses, *under any other legal qualification*, shall be good and available in law;"—the same number of witnesses being necessary to the probate, whatever may be the form of attestation.

This construction is perfectly conformable to the caution and to the liberal principles of the Legislature of that day. They first take care to establish a mode of proof according to *their own* religious persuasion, and then, under the general expressions—"other legal proof"—would admit all modes of attestation, which either the laws of that day, or any future time, should recognize.

Without such precautions, how precarious would be the situation of property! In the last moments of life, when the body is depressed with sickness, the understanding impaired by age, and the mind agitated with doubt and apprehension, we may easily conceive the succesful operations of artifice and fraud. The government of every wise and enlightened nation has endeavoured, therefore, to protect the imbecility and weakness of that state, from the force or cunning of interested men: nor is it just to the reputation of this country, to suppose, that her Legislature alone has left the proof of the last, and most solemn, act of her citizens, to mere circumstances and conjecture.

The Court took time to consider of their Judgment, which was the next day delivered by the CHIEF JUSTICE.

M'KEAN, *Chief Justice.*—This cause comes before us upon an appeal from the register of wills, and two Justices of the *Court of Common Pleas* of the county of *Montgomery;* and, it is agreed, that there is but one question for the determination of the Court; to wit, whether a will not written by the testator, or subscribed by him, but put into writing by his direction, and proved to be so only by the person who drew it, ought to be established as a good and perfect will and testament?

The disposition of property by will, was certainly the first mode of conveyance used among men; and some authors, in tracing its antiquity, have informed us, that *Noah* made a will, devising the whole world to his sons, according to their respective proportions. The conveniency of the thing having rendered it universal, custom, at length, became a law for its support; and different solemnities, or forms, were prescribed by different Legislatures, in order to fix the authenticity of a testamentary writing. Thus, by the *Roman* law, it was originally requisite that a will should be in writing, subscribed by the testator, if he could write, before seven

witnesses, and, if he could not write, then published by him in the presence of eight witnesses; but this number was properly reduced to two in the time of *Justinian*. By the civil and ecclesiastical laws, as they prevail in *England*, the ablest writers concur in saying, that two witnesses are required, and that two are sufficient to prove a will. The statute of 32 *H.* 8. *c.* 1. (which is merely explained by the 34. and 35. of the same reign) enables a man by his will in writing to dispose of all his soccage lands, and two thirds of his lands held *in capite*; which, by the subsequent operation of the 12 *Car.* 2, *c.* 24. extends to all his real estate. It is incontrovertibly settled, however, that neither the statute of *Henry* 8. nor the statutes by which it is explained, made any alteration in respect to testaments of goods and chattels; and therefore, they are still regulated, as they always were, by the civil and ecclesiastical law, which, as it has been already remarked, requires the attestation of two witnesses. 1788.

As this, then, was the established rule in *England*, and as by the charter from *Charles* the *Second* to *William Penn*, the laws of *England* relating to property, were to be the laws of the Province, until altered by the Legislature of *Pennsylvania*, we must now enquire, whether any act of our Legislature has substituted another mode of proof?

It is contended, on the part of the *Appellees*, that the law, enacted in the year 1705, has placed wills of real estate, and testaments of personal property, upon the same footing; and that any proof which would be sufficient to convince a Jury of a fact in issue, is, by that law, made competent to the probate of a last will and testament. It has been argued, likewise, by the same Council, that, even in *England*, from the passing of the statute of 32 *Hen.* 8. *c.* 1, 'till the passing of the statute of frauds, 29 *Car.* 2. *c.* 3. the positive testimony of witnesses was not required, but that any common law evidence, founded upon circumstances, was sufficient to prove a will of lands. On this point there is, perhaps, no *express* adjudication to be met with in our books; yet there are cases in which the necessity of two witnesses to a will of lands, seems strongly to be implied. *God. Orph. Leg.* 15. *Dy.* 72. *Plow.* 345. But the cause before the Court must finally depend upon a proper construction of the act of Assembly; which has declared, that "Wills, &c. being proved by two or more credible witnesses, " on their solemn affirmation, or by other legal proof, shall be " good and available in law;" and as all testamentary writings, whether for the disposal of real, or personal, estate, are subject, in this respect, to one rule, the whole dispute rests upon the words, *or other legal proof.*

In the construction of statutes, the same principle should be observed, which prevails with respect to wills; and the intent and meaning of the Legislature in the former, ought to be as carefully sought after, and as faithfully pursued, as the intent and meaning of the testator in the latter. What then was the intention of the Assembly in passing this act? The Appellees allege, that it was to admit common law evidence in the case of wills; and that

1788. *other legal proof* is an alternative opposed to the *number of witnesses*. But to this, it has been answered, that less proof than two witnesses could not, consistently with the reason and nature of the subject, be intended; and that *other legal proof* is put in opposition to *solemn affirmation*, in order to admit the attestation of an *oath*,—whether administered upon the *Gospels* to a *Christian*, or upon the *Pentateuch* to a *Jew*; whether with the solemnity of an uplifted hand, according to some sectaries; or with the ceremonial of the hand placed beneath the thigh, as it is practised by the *Gentoo* nations.

This appears, upon the whole, to be the genuine exposition of the act; and the adverse doctrine is pregnant with so much absurdity and inconveniency, that it ought not to be imputed to the Legislature, nor ought it to receive the sanction of the Court. Besides, we find, that this very act requires the testimony of two, or more, witnesses to the probate of a *nuncupative* will, and likewise, to the *revocation* of a will; and every principle which could make it necessary in those instances, must, *a fortiori*, operate in the case before us: For, it could not be designed, that greater solemnity should be observed in a *verbal* testament, or in *repealing*, than in *making*, a last will and testament;—an act of the most serious and important nature, not only as it affects the testator, but as it affects the peace and welfare of posterity.

In short, from the uniform tenor of the acts of Assembly, from the practice of the Courts, and from the other analogous sections of the same law, it is evident that the Legislature meant to require two witnesses, in proof of every testamentary writing, whether for the disposition of real, or personal estate. This opinion, in which the Court unanimously concur, we are happy to deliver; for, it would be dangerous indeed, were the idea tolerated for a moment, that a notary, or any individual, could alone, according to the opposite construction, prove the validity of the will which he had written. By such means the very purpose of wills might be defeated, and the fullest scope given to foul and fraudulent impositions.

Bryan, *Justice*.—The witness, on the present occasion, is indubitably a man of fair and upright character; and, therefore, it is the more particularly to be observed, that the opinion of the Court is founded upon the indispensable necessity of having two witnesses to the probate of every will.

By the Court: Let the sentence and proceedings of the Register's Court be reversed.*

KIRKBRIDE *et al.* Plfs. in Err. *v.* DURDEN.

THE Plaintiffs in error had executed a bond, bearing date the 23*d* of *October*, 1784, to the Defendant, with a warrant to confess Judgment thereon directed "*To Wm. Lewis*, attorney "of *the Court of Common Pleas* at *Newtown*, in the county of *Bucks*,

* See 2 *Dall. Rep.* 266. *Ibid.* 286.

" or to any other attorney, of *any other Court*, and at the same 1788.
" time a mortgage of lands in the same county, as a collateral
" security." The Judgment was entered in the *Supreme Court*, as of *Bucks* county of *September Term* 1787; whereupon a writ of error was sued out, in order to set the Judgment aside, and the following errors assigned:

1*st*. That the Judgment was entered *in the Supreme Court* for a debt which arose *before* the passing of the act of Assembly, that gave original jurisdiction to the Supreme Court, *in the county of Philadelphia*.

2*dly*. That the warrant of attorney did not authorize the entering up the Judgment *in the Supreme Court:* and

3*dly*. The general errors.

To which *in nullo est erratum* was pleaded.

Swift, for the Plaintiff in error, argued, I. That the *Supreme Court* never had *original jurisdiction* 'till the late law; for, the act by which it was instituted, gives only an *appellate jurisdiction:* 1 *State Laws*, 114. 115. *Sect.* 11. and that it was evidently the intention of the Legislature to confine, even the exercise of that power, to suits *exceeding £.*50. *Ibid.* 338. 9. *Sect.* 4. He insisted, that the act of Assembly giving the original jurisdiction, likewise furnished a satisfactory inference, that the Court did not previously possess it; but that, at all events, after that act was passed, no action, for *any antecedent debt or cause*, could be brought *in the Supreme Court;* nor, even for debts arising after that act was passed, in *any other county than Philadelphia*. 4 *State Laws*, 154. *Sect.* 4. 5.

II. On the second error, he stated, that, as it was an error *in fact*, the Defendant's plea had allowed it; for, if the Plaintiff assigned *error in fact, and error in law*, the Defendant ought to join issue as to the fact, and plead *in nullo est erratum* as to the matter of law; but if he pleads *in nullo est erratum* only, he admits the facts, and the Judgment must be reversed. 2 *Bac. Abr.* 218. He waved this advantage, however, and contended, that the warrant, authorizing any attorney, to enter up the Judgment *in the Court of Common Pleas*, of *Bucks* county, could not be extended to authorize the entering it up *in the Supreme Court:* for, where an *inferior* thing is mentioned, a *superior* cannot be intended. 2 *Co.* 46. and such has been the uniform determination of the Judges. 2 *Inst.* 457. 8. The warrant of attorney gives a bare authority, which ought to be strictly pursued; and, though directed to any attorney of *any other Court*, this cannot be taken to mean of a *Superior Court*, but only *Courts of equal and concurrent jurisdiction*. Nor can the jurisdiction be given by consent (which he said, however, was not the present case) for, common recoveries are certainly actions by consent, and yet it was necessary that a law should expressly vest, in the Supreme Court, a power to entertain them. 1 *State Laws*, 224. But the intention of the parties appears by the mortgage, as well as by the *Court* specified in the warrant, to have been to bind only the estate *in Bucks county;* whereas, by entering up the Judgment in the Supreme Court,

1788. a lien is obtained upon the lands of the Plaintiff in error, *throughout the State.*

Wilcocks, for the Defendant in error, admitted, I. That it had been long a question, whether the Supreme Court had original jurisdiction before the passing of the late law; but, even resolving that point in the negative, he contended, that the Court might receive and sustain a cause under the peculiar circumstances of the present case. For, being an action of debt, it was, in its nature cognizable there, and no law prevented the parties from confessing Judgment, by consent, without the trouble and expence of an original. This was not, therefore, to be construed into an exercise of original jurisdiction; but merely a passive acquiescence in the agreement of the parties, to enter a Judgment upon the records of the Court. Such, he said, had been the old and constant practice in *Pennsylvania*, both before and since the revolution, as well with respect to the confession of Judgments, as to the entering of amicable actions; and if the matter were to be traced, the titles of many real estates would be found to depend upon its legality—so that the greatest disorder and uncertainty would be introduced by a contrary determination at this time. If, then, it was never doubted that the Court had a sufficient authority to compel the parties to perform an agreement, *a fortiori*, they may compel the performance, when the agreement is made with the solemnities of a warrant of attorney, and under circumstances which would otherwise be attended with the most pernicious consequences.

II. With respect to the *second error*, he said, that, if it were necessary, the Court would permit him to alter his plea; but as it had been agreed to discuss the validity of the warrant of attorney on the present issue, he should contend, that the cases cited did not support the objection. He admitted, that when an act of parliament entered into an exact enumeration, and it appeared from the subject, that nothing more was intended, than what was expressed, there the rule prevailed, and a recapitulation of *inferior* things could not, by implication, affect things of a *superior* nature. But when an act contains general and comprehensive words, which indicate an intention to embrace a higher object, he insisted, that the spirit and meaning of the law, was not to be fettered by the mode of expression. This controversy, however, he distinguished from the case of statutes; for, he said, it did not arise on the construction of an act of parliament, but whether an instrument, executed by an individual, was sufficient to authorize certain proceedings. It was, therefore, a matter of a private nature, and must be construed, as all contracts between debtor and creditor are construed, that is, according to the true intent and meaning of the parties. The form of the warrant is the same that has been used for more than a century past; it is general; it is comprehensive; and it has ever been taken in that sense, which gives the greatest benefit to the obligee, that can be obtained from the confession of the Judgment. The late act of Assembly (passed *September* 1786,) which gives *original* jurisdiction

to the *Supreme Court* in *Philadelphia*, in *Sect.* 4. plainly supposes the causes to be such as are instituted by *Capias*, *Summons*, *Attachments*, *Scire Facias*, *Partition*, or *Dower*; all which modes are particularly specified; and it certainly holds forth no idea to prevent an amicable suit being entered, or a Judgment being confessed, by a special warrant of attorney, as in the present case. It was natural to specify the *Common Pleas* of *Bucks* county, because the parties lived in *Bucks*, and the estate, upon which the mortgage was given, lay in that county: but it was certainly in the power of the obligor to give authority to enter Judgment in any Court within the *United States*—from the nature of the contract it must be presumed that he intended to do so, as well as from the terms of the warrant, which authorize the entering the Judgment in any Court in *America;* and, agreeably to the established practice and interpretation of such warrants of attorney, the Judgment has been confessed in the *Supreme Court.* 1788.

The CHIEF JUSTICE delivered the unanimous Judgment of the Court.

M'KEAN, *Chief Justice.*—We are happy that this cause has come before us so recently after the passing of the act of Assembly: as, by an early settlement of the practice, much uncertainty and litigation may be avoided.

There are *two* grounds upon which, we are clearly of opinion, this Judgment ought to be set aside. The *first* is, that though it has been entered, in pursuance of a warrant of attorney, after the passing of the law, yet *the bond is of a prior date;* and we find it expressly enacted, "that no suit or action shall be commenced "in the said *Supreme Court for any debt or cause which arose* BE-"FORE *the passing of this act*, except suits of the Commonwealth, "and such wherein the title of land, or other real estate, may come "in question." For this reason, therefore, we think that the Judgment could not have been entered up, *even in the county of Philadelphia.*

But, in the *second* place, whatever doubts may formerly have been entertained, it is certain that, *after the 2d of January* 1787, the *original jurisdiction* of the *Supreme Court* is, by the *4th Section* of the same act, restricted to the *county of Philadelphia;* and this Judgment being entered, at a subsequent period, in the *Supreme Court* as of the *county of Bucks*, there can be no doubt, that the proceedings are, likewise, on that account, erroneous and irregular.

The intention of the Legislature was, evidently, to prohibit the entering up Judgments on bonds, &c. by virtue of warrants of attorney in that Court, which should affect the lands of the party in any other county than *Philadelphia;* and the consequences would be so injurious, that, even if we could, we ought not to admit a different construction of the act. For, if one Judgment were entered in *Washington* county, and another *here*, on the *same* day, by what principle could we determine, which of those Judgments had the *prior* lien? The question would be productive of

1788. great perplexity in the administration of justice; and might eventually prevent the transfer of lands, which it is the policy of this country to facilitate and encourage.

With respect to the other objections;—the Court might give the Defendant leave to amend his plea, so as to remove the difficulty, which arises from the assignment of the errors in fact. And, though the question on the extent of the warrant of attorney, would require some consideration, yet, it is a rule, that the acts of the parties, as well as acts of Parliament, shall be liberally construed to promote the remedy. I have, therefore, no doubt, that if the Judgment had been entered in the *Supreme Court* of the state of *New-Jersey*, it would be deemed good there; although that Court is not similar to the Court specifically named in the warrant. But it is unnecessary to pronounce any determination upon these points, as our opinion is unanimous, for the other reasons which have been mentioned.

Let the Judgment be reversed.

Swift suggested, that, as the Judgment had been entered *coram non judice*, the Plaintiff had been wantonly driven to bring the writ of error, and might, therefore, be entitled to costs.

But, by M'KEAN, *Chief Justice*.—If you had moved the Court below, the same decision would have taken place; and the act of Assembly is positive, that on the *reversal* here of a Judgment, each party shall pay his own costs. See 2 *State Laws*, 273. *Sect.* 7.

Common Pleas,

PHILADELPHIA COUNTY.

June Term, 1788.

TETTER *v.* RAPESNYDER.

THE parties, having consented to a reference, filed a written agreement appointing three persons, without saying or any two of them, to report; but the clerk, in making out the rule, had so expressed it. The three referees met, though only two of them signed the report; and now *Lawrence* moved to set it aside, on account of this variance between the rule and the agreement of the parties, offering to examine a witness, who was present at the transaction, to shew that it was intended all the referees should concur. See *Fitzg.* 215.

To this, *Ingersoll*, for the Plaintiff, objected; and said, that where parties have reduced their agreement to writing, particularly in the case of a record, nothing by way of addition or alteration was admissible. To prove a name meant, or a fraud committed, and some other similar circumstances, were, he insisted, the only exceptions to this principle.

But, by THE COURT:—The question is not, whether parol testimony shall be given against a record; but whether the agreement filed in the Court, was a sufficient authority to the clerk to make out the rule to any two of the referees. If this was his mistake, it certainly ought not to bear against the Defendant.

The witness being examined, and having proved the Defendant's allegation, the opposite Council contended, that as the rule had been before the referees and was inspected not only by them, but by the parties, it was too late to make the objection; for, it would be unjust to allow this advantage to the Defendant, after the whole business had been discussed, and the report agreed upon.

1788. *Lawrence* proposed reading some cases to shew, that the authority given to the referees by the act of the parties, ought to have been strictly pursued.

But, by THE COURT:—There would have been something equitable in the objection to the report, if only two of the referees had met; but, as it appears that they all entered on the business, though only two of them have subscribed the report, we can consider nothing but the evident mistake of the clerk; and, for that reason alone,

Let the report be set aside.

THOMPSON *v.* YOUNG.

ON a rule to shew cause why an *Exoneretur* should not be entered on the bail-piece, it appeared, that the Defendant was a resident of *Maryland* (though he came occasionally to *Philadelphia* upon business) and was duly discharged under the insolvent law of that State. Upon the authority of *Millar* v. *Hall*, *ant.* 229. the rule was made absolute.

Sergeant and *Ingersoll*, for the Plaintiff, attempted to establish this distinction that, in *Millar* v. *Hall*, the Defendant was a citizen of *Maryland*, and that the money, for which the action was brought, had been received in *Baltimore*; but that in this case, *Young*, though sometimes in *Maryland*, was, in fact, a citizen of *Pennsylvania*, and that the debt was contracted here. They acknowledged, however, after the examination of the witnesses, that they had failed in their proof; and, therefore, no argument was made in support of the distinction.*

WHITESIDE *v.* OAKMAN.

THIS was a *forcign attachment* returnable to *December* Term 1787, in which Judgment had been entered agreeably to the act of Assembly.

Ingersoll now moved for a rule to shew cause, why the attachment should not be quashed; observing, that if the same thing might be done in a circuitous manner, he supposed it could not, in this way, be deemed too late: For, upon entering special bail, the Plaintiff might be called on to shew cause of action; and attachments are often set aside where no cause is shewn.

SHIPPEN, *President*.—It is very late to move for a rule of this nature. If there is a mistake in the proceedings, but not on the merits, to shew the cause of action may be required, after special bail is entered. We should be afraid, however, of introducing so dangerous a practice as would be countenanced by granting the present motion.

* See the authorities cited *ant.* p. 192. *in not.*

Ingersoll said, that, if the Court were of opinion, that he was too late, he should not certainly press the question; but wave his motion; which was accordingly done. 1788.

MORGAN *v.* ECKART *et al.*

MORGAN *v.* BOWER.

ON a rule to shew cause, why the arrests in these actions, should not be set aside, it appeared, that *Eckart*, being the *lieutenant* of *Berks* county, came to *Philadelphia* in order to obtain from the *Executive Council* the commissions of some officers of the *militia* within his department; that *Bower*, being one of the *sheriff's elect* of the same county, came for the purpose of soliciting his commission, and giving the usual security; and that while here for these respective purposes, they were both arrested at the suit of the Plaintiff.

Tilghman, in support of the rule, contended, that the Defendants were privileged from arrest, on account of the public nature of the business which brought them to *Philadelphia*; and stated, as the great principle upon which privilege and protection are founded, that the rights and interest of the *Commonwealth* must, in many cases, be preferred to those of individuals. *Vin. tit. Priv.* 84. *pl.* 1. He then classed the cases of privilege under two general positions:—1*st*, That where by law it is a man's duty to attend at a particular place, or Court, he shall be sued there only; and no one shall be compelled to undertake any thing inconsistent with such duty, or with his profession, in particular cases. *Vin. tit. Priv.* 509. *pl.* 1. *Cro. Car.* 385. *Sir W. Jones*, 462. *Stra.* 1107. 3 *Leon.* 149. *Vin. tit. Priv.* 513. *pl.* 8. *Barn. Notes*, 200. 378.—And, 2*dly*, That where a man is under a legal obligation to attend, or where he goes to demand justice, he shall not be arrested at all. *Vin. tit. Priv.* 515. *pl.* 6. *Com.* 446. 1 *Brownl.* 15. 2 *Black. Rep.* 1113. 1 *Atk.* 54. *Stra.* 1094. *Vin. tit. Priv.* 512. *pl.* 18. *ibid.* 514. *pl.* 12. 13. *ibid.* 515. *pl.* 6.

In the present instances, he urged, that it was incumbent upon the *sheriff* to wait on the *Executive Council*, as the law required him to give such security, as they should approve: And, with respect to the *lieutenant* of the county, he alleged, if the Court now doubted, they would be satisfied upon enquiry, that he likewise was in the prosecution of his official duty on the above mentioned occasion.

He then adverted to the impolicy of increasing the jealousy, that seemed to subsist already too much, between the city and the remote parts of the State; but this, he predicted as an inevitable and ruinous consequence, if, whenever a countryman came hither upon public business, he was liable to be arrested and detained. The city would soon be likened to the lion's den, towards which innumerable tracks of feet might be traced, *sed nulla vestigia retorsum.*

1788. *Sergeant* and *J. B. M'Kean*, for the Plaintiff, stated, that the cases of privilege in *England*, were limited to an attendance upon Parliament, or upon Courts, as a party, juror, witness, or officer; and that all the authorities which had been cited for the Defendants, were fully comprehended within these bounds. They admitted that reasonable privilege had, likewise, been allowed in *Pennsylvania*; but denied that, in either country, the doctrine had been extended to the object of the present rule. For, they insisted, that the *sheriff*'s attendance upon the *Executive Council*, was voluntary, in order to solicit an appointment, which, notwithstanding his being on the return, the Council might, at pleasure, grant, or refuse. Neither was he bound to give security 'till he was appointed; and, even then, it was not necessary to be given in the city of *Philadelphia*.—With respect to the *lieutenant* of the county, nothing, they said, could be more evident, than that his visit to *Philadelphia* was an act of supererogation, to perform what no law required him to do, and what might as well have been performed through the agency of a post-rider.

If, indeed, the attendance of the *sheriff*, or of the *lieutenant* of the county had been required by the *Executive Council;* or, if they had been brought before that Board by any legal process; they might then have claimed the advantage of the general rule of privilege. But there can be no pretence in reason, or law, to exempt from an arrest, either a man, who voluntarily comes to solicit an office; or one, who undertakes a journey merely to oblige his neighbours by bringing them their commissions.

At an adjourned sittings, held on the 6th of *September*, THE PRESIDENT delivered the clear, and unanimous opinion of THE COURT, that the Defendants were not protected from arrests, for any cause that had been shewn. He observed, that they had not been required by the *Executive Council* to attend them, but evidently came to *Philadelphia* on their own private business; and that it was the duty of the Court to be careful not to extend the doctrine of privilege to the injury of honest creditors.

The Rule discharged.

BOLTON *v.* MARTIN.

THE Defendant was one of the members from *Bedford* county, in the State Convention, which assembled at *Philadelphia*, to take into consideration the adoption, or rejection, of the Constitution proposed for the government of the *United States*, by the Federal Convention on the 17th of *September* 1787. During his attendance upon this duty, he was served with a *summons* at the suit of the Plaintiff; and *Sergeant* obtained a rule to shew cause, why

the statute of *W.* 3. and, by the strongest implication, shews, that it could not be done at the suit of a private person. A little higher, in the same page, a general position of Judge *Blackstone* will be found, which fully reaches the case in question. "Neither (says "he) can any member of either House be arrested, or taken into "custody, *nor served with any process of the Courts of Law*, nor "his servants arrested, &c. *without a breach of the privilege of* "*Parliament.*" 1788.

In the case before us, the Defendant appears to have been served with a *summons* out of this Court, *during the time of the actual sitting of the Convention.*—Whether we take the law to be, as it stood in *England* before, and at the time of passing the act of *W.* 3.; or as it stood after the passing that act down to the *10th of Geo.* 3. about six years before our revolution, it is clear that no member of Parliament, other than those particularly excepted, could be *arrested or served with any process* out of the Courts of Law, *during the sitting of Parliament.*

We cannot but consider our members of Assembly, as they have always considered themselves, entitled by law to the same privileges. They ought not to be diverted from the public business by law suits, brought against them during the sitting of the House; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law suits, and to bring witnesses from a distant county, to a place whither they came, perhaps solely, on account of that public business.

The Defendant, therefore, must be discharged from the action.*

KUNCKLE *v.* WYNICK.

COVENANT.—The argument arose upon the following case, stated for the opinion of the Court:—"*John Kunckle* on the "7th day of *Oct.* 1784, conveyed to *Nicholas Wynick*, in fee simple,

*Since these reports were committed to the press, I have been favoured with a note of another case in this Court, upon the question of privilege; and, I hope, I shall be excused for introducing it here.

CALDWELL *v.* BARCLAY *et al.*

Foreign Attachment.—*Moylan* obtained a rule to shew cause why this Attachment should not be quashed, on the ground that one of the Defendants, *Barclay*, being an *American* Consul, and in that character actually residing abroad in the public service, was not within the description of persons, whose effects were made liable to a foreign attachment by the act of Assembly

The rule was opposed by *Wilson*, *Bradford*, and *Sergeant*, who contended, that as a *Consul*, *Barclay* was not entitled, by the law of nations, to any privilege, or exemption from legal process; that, even if he was privileged on account of his official character, he had lost that advantage, by his partnership with the other Defendant, who was not entitled to it; and that the act of Assembly makes no difference between persons serving their country abroad, and any other non-residents.

After an able argument, the opinion of the Court was delivered by Mr. *President* SHIPPEN; agreeably to which

The rule was discharged.

1788. " a lot of ground in the *Northern Liberties* of the city of *Philadel-*
" *phia*, reserving a rent-charge of 40 dollars *per ann.* payable on
" the 1st day of *October* annually. Before any rent was due, *Ni-*
" *cholas Wynick*, on the 15th of *July*, 1785, assigned and con-
" veyed all his interest in the premises to *Henry Meyers*. The
" Plaintiff accepted one year's rent of the Assignee. The ques-
" tion is, whether he can recover in the present action, which is
" for one year's rent accruing subsequent to that paid?"

The conveyance from *Kunckle* to *Wynick* contained the following clause:—" And the said *Nicholas Wynick* for himself, his heirs,
" executors and administrators, doth hereby covenant, promise,
" and agree, to and with the said *John Kunckle*, his heirs, and as-
" signs, that he, the said *Nicholas Wynick*, his heirs, or *assigns*,
" shall and will at his and their own expence, within one year
" from the date hereof, erect, build, and finish, on the hereby
" granted lot, one good substantial dwelling house, at least 16 feet
" square and 2 stories high, with a cellar under the same walled
" up with brick or stone; *and shall and will* from time to time and
" at all times hereafter for ever, well and truly pay, or cause to
" be paid, unto the said *John Kunckle*, his heirs, or assigns, the
" aforesaid yearly rent or sum of 40 dollars, &c."

Rawle, for the Defendant, made two points: 1st, Whether the sentences in the clause above stated from the deed, could be so coupled and interwoven, as to create an express covenant, on the part of the grantor, that his *assigns* should pay the rent-charge? and, 2dly, Whether acceptance of rent from the Assignee, was not a bar of the Plaintiff's demand of the rent from the Assignor?

1. On the *first* point he endeavoured to construe the covenant, so as to extend it to the *assigns* of *Wynick*, *only* in the case of building the dwelling-house, and not in the case of paying the rent. But he did not seem to expect much success from this discrimination.

2. On the *second* point, he argued, that this was a rent issuing out of the land, which the Plaintiff had elected to pursue by his acceptance of rent from the Assignee; and that this acceptance was a bar to his demand against the Defendant. *Cro. J.* 522. 3 *Rep.* 22. 2 *Bulstr.* 152. He admitted, that 3 *Lev.* 233. *Saund.* 240. *S. C.* appeared to be strong against him; but, contended, that in truth, they ought not to have any weight with the Court, since the present question was not immediately in agitation in those cases, and, consequently, what has not been expressly adjudged, cannot be set up as an authority. As 1 *Bac. Abr.* 536. is founded on 3 *Lev.* 233. it must necessarily follow the fate of its principal. With respect to *Keb.* 640. he presumed that the reporter had been guilty of some mistake, and questioned whether his doctrine had been received even in *England*.

But he urged that whatever might be the practice there, the laws and circumstances of *Pennsylvania* had rendered a different one necessary here; for the acts of Assembly altering the common law, carried with them many consequences, which were not expressly provided for in the acts themselves; as in the case of *real*

estates made subject to executions for debt, and in the case of a *Devastavit* committed by an administrator. He insisted that the policy of the laws of this State was to facilitate the transfer of lands, in contradiction to the genius of the common law; that, therefore, it might be incumbent upon the *English* Courts to enforce with the greatest strictness the express covenants in a conveyance; but that our Courts ought rather to construe them liberally so as to prevent unnecessary embarrassments in the change of property. If, then, the Defendant is liable, for the last year's rent, he must be liable, by the same rule, for the rent of 40 years standing; and thus, as the grantor of a rent-charge can never be exonerated, or even safe in the disposal of the estate from which it issues, the restraints on sales and transfers will become daily more numerous, and more injurious to the public welfare. 1788.

Milligan, for the Plantiff, observed, that as the *first* point was a matter of mere construction, he should leave it implicitly to the Court.

With respect to the *second* point, he contended, that the difficulty had arisen from not distinguishing properly between actions of debt and actions of covenant: For, he granted, that an action of debt would not lie in this case; as it requires privity of estate to support it; but that the action of covenant required only privity of contract, and, therefore, would well lie against the grantor of the rent-charge, after his assignment. In support of this distinction he cited 1 *Roll. Abr.* 522. *Cro. C.* 580. 1 *Saund.* 240. 2 *Keb.* 640. 1 *Bac. Abr.* 536. *tit. Covenant. Cro. J.* 309. *Sid.* 402.

Shippen, *President.*—The question in this case is, whether on a ground rent deed, wherein there is an express covenant on the part of the Lessee for payment of the rent, and he assigns over the premises, and the Lessor accepts rent from the Assignee, an action of covenant will lie for the Lessor against the Lessee for the subsequent rent.

The distinction between actions of debt and actions of *covenant* in this case, is too well established to be now unsettled. The action of debt lies upon the privity of *estate*, which is utterly extinguished between the Lessor and Lessee by the Lessor's acceptance of rent from the Assignee. The action of covenant, when founded upon an *express* covenant, lies not upon the privity of *estate*, but privity of contract, which cannot by the assignment of the premises, or by any act of the Lessee, or by acceptance of the rent, be transferred from him. The covenant, however, must be an express covenant, not an implied one, or a covenant arising by operation of law, as by the words "yielding and paying" &c. in the deed.

The cases in the books upon this point are generally of actions of covenant for not making repairs; and a distinction has been attempted to be made between those and actions for the *rent:* in the latter case it is said, that the land being the fund out of which the rent is to issue, and *that* being transferred, the Lessor's ac-

1788. ceptance of rent from the Assignee will take away all remedy against the Lessee himself. I have looked for this distinction in the books, but cannot find it in any case where there was an express covenant for the payment of the rent. The cases found the law upon the personality of the contract; which extends equally to the payment of the rent, as to the making repairs; and, though the authorities are not so *numerous* in the one case as the other, yet they are as *express*. 2 *Keb.* 640. and 2 *Barnard.* 372. are full to the point. If these books are thought to be of doubtful authority. 1 *Roll. Ab.* 522. cites two cases, where the breach of covenant was for *non payment of the rent*. In 1 *Sid.* 402. where the Court draws the distinction between debt and covenant, they expressly mention the action to be for the *rent*; and the case in 3 *Lev.* 283. is likewise covenant for non payment of the rent.

As to the argument *ab inconvenienti*, I cannot see how it operates more in this country than in *England*. If Lessees mean not to be personally bound after assignment, they should take care what covenants they enter into. If they will, in express words, covenant for the payment of the rent, they must be bound by it.

Judgment for the Plaintiff.

WELLS *et al.* Appellants, *v.* FOX.

THIS was an appeal from the determination of the regulators of party walls, &c.—*Howell* moved that a *Venire* should issue agreeably to the third section of the act passed the 15th of *April* 1782, 3 *State Laws* 75. allowing the appeal to the next Court of *Common Pleas*, and enacting, that thereupon "the said Court "(upon security being entered, &c.) shall direct a *Venire* to the Sheriff, &c."

Sergeant thought that the question ought to be tried upon a feigned issue, or under an ejectment; to either of which he would agree.

But by SHIPPEN, *President.*—A feigned issue can only determine, whether the regulators have done right or not; it cannot determine the title, and finally settle the matter. For this reason we think it proper to try the question by ejectment.

Lewis and *Wilcocks* said, the practice in the *Supreme Court* had been conformable to the opinion of the *President* here.

COOPER *v.* COATS.

A BOND and Warrant to confess Judgment had been executed by the Defendant for £. 600. Before the Judgment was entered up, he had paid so much of the money as reduced the sum really due to less than £. 10: And the question stated for the opinion of the Court, was, whether the Plaintiff should be allowed costs?

Hallowell and *S. Levy* urged, that this was the case of a bond with a warrant of attorney, upon which they could not have confessed Judgment before a Justice; that a Justice could not have taken cognizance of a set off exceeding £. 10, and that the penalty of a bond was intended to cover the interest and costs; so that, even for the surplus, it was necessary in *England* to seek for relief in a Court of equity. 1786.

Sergeant contra. Where the sum is under £. 5. the act of 1745, 1 *State Laws* 204. meant to give full jurisdiction to the Justices, except in certain enumerated cases; and the same jurisdiction is afterwards extended to sums under £. 10. by reference to that act. The expressions of the Legislature are "that all actions for debt "or other demand for the *value* of 40*s.* and upwards, and not exceeding £. 5. &c. shall be cognizable before any Justices, &c." which word *value* must intend something more than a penalty; for the penalty of a bond, being generally double the sum due, would exceed £. 10. although the *value* of the debt might be less. In the present instance Judgment is taken only for £. 7. Debt upon a bond for the payment of money, is within the jurisdiction of the Justices; but, if the opposite construction were to prevail, the act, which was framed to save costs, might in almost every case of a bond be defeated.—This is not like a set off, which we might defalc or not, as we pleased; and, as to its being the case of a Judgment confessed by warrant, that will be no recommendation to the favour of the Court.

SHIPPEN, *President.*—In the case of a set off, this rule, with respect to costs, would be subject to great inconveniency, for, as it happened this Term, in *Coxe* v. *Bolton*, a set off of £. 60. might be given in evidence, though the Plaintiff could never bring the matter to a trial before a Justice; as it was not in his power to say whether the Defendant would resort to an action, or take advantage of the defalcation.

The opinion of THE COURT was afterwards delivered to the following effect:

SHIPPEN, *President:*—We think this case comes within the express words of the act of Assembly, declaring that costs shall not be recovered; and there is no evidence that the Defendant has entitled himself to the benefit of the exception, by filing a previous affidavit of his belief that the debt exceeded £. 10.

It is not our meaning, however, when an action is brought for a sum above £. 10. and the Defendant reduces it to less by a set off, which he might, or might not, have pleaded, that, in such a case, the Plaintiff is not entitled to costs. The reason and justice of the thing would then be clearly in his favour.*

Judgment for the Plaintiff, but without costs.

* See 1 *Wils.* 19. 2 *Stra.* 1191. *Acc.* 2 *Dall. Rep.* 74.

1788.

KEELY *v.* ORD *et al.*

INDEBITATUS ASSUMPSIT for goods, *to wit*, 16 hogsheads of rum, sold and delivered.—The Plaintiff by his books, and oath of his clerk, proved the sale to the Defendants.

The Defendants gave in evidence, that a certain *George Henry* was two thirds owner of the cargo of which this rum was a part; and, in order to prove that the rum was purchased of *George Henry*, and not of the Plaintiff, they offered to prove by *Henry*'s clerk, that he had made a charge in *Henry*'s books, by the direction of *Henry*, of the sale of the rum to the Defendants.

To this, it was objected, that the books of *Henry* should be produced to shew the entry; and that, otherwise, the evidence of the clerk to the contents of the books ought not to be admitted.

And of this opinion was THE COURT; but, at the request of the Council for the Defendants, they reserved the point.

LYNCH *v.* WOOD.

LEVY exhibited an account of expences in the execution of a commission, which had issued for the Plaintiff, *ex parte*, and moved that they might be allowed in the costs. Besides the charges for swearing the witnesses, and for their attendance on the Commissioners, there were charges for agency, and for the expences of travelling to collect the testimony.

THE COURT allowed the charges for swearing the witnesses, and for their attendance; but rejected those for agency and travelling.

HUDSON *v.* HOWELL.

TRESPASS *vi et armis*. *Capias* returnable to this term. *Howell* moved to quash the writ, the Defendant being a freeholder.

Millegan objected that this was a case excepted by the act; a *fine* being due to the Commonwealth, upon the Judgment *capiatur pro fine*, in actions *vi et armis*.

But, by SHIPPEN, *President*.—The practice has been long settled under this act. Unless it is a suit on a recognizance, or for a fine actually due to the State, we cannot take up a mere fiction, to defeat a positive privilege.

The writ quashed.

Supreme Court of Pennsylvania:

July Term, 1788.

The Appeal of BROWN Exor. of EDGAR.

THIS was an appeal from the *Orphan*'s *Court of Philadelphia* county on the following case. *Brown*, having received £. 400. on account of the estate of his testator *Edgar*, paid it over (according to his uniform practice upon such occasions) to his co-executor *Dogherty*. In *Brown*'s books this money was charged, generally as so much cash paid to *Dogherty;* but, in *Dogherty*'s books, credit was given for it on account of the estate of *Edgar*. *Dogherty* became insolvent; and upon a settlement of *Brown*'s administration, the *Orphan*'s *Court* refused to allow him the £. 400. thus paid over to his co-executor; but charged him with the principal sum, and interest from the time he received it, 'till the year 1776, (nine years) dropping the interest from that time 'till 1781, and afterwards reviving it.

It was argued in *January* term by *Wilcocks* in support of the appeal, and *Lewis* against it; when three points were made; 1st, Whether, the money was a loan to *Dogherty*, or a payment to the estate of *Edgar;* 2d, Whether, if it was a payment to the estate of *Edgar*, *Brown* was thereby discharged; and 3d, Whether interest was payable to the residuary legatees, who were the appellees upon this occasion.

The CHIEF JUSTICE, having stated the points that were made in the cause, now delivered the opinion of the Court.

M'KEAN, *Chief Justice*.—From the evidence we must determine, on the *first* point, that the money was a payment to the estate of *Edgar*. It was *Brown*'s constant practice to transfer

1788. all his receipts to *Dogherty;* and this sum of £. 400. is credited to him in the accounts of the estate kept by the latter.

With respect to the *second* and *third* points, it must be observed, that the Courts of Chancery make it a general rule, that he who receives money should be answerable for it; and, therefore, if one executor becomes insolvent, or bankrupt, the other shall not be charged. There is a difference, however, between legatees and creditors; the former being appointed, as well as the executor, by virtue of the testator's will; and consequently cannot impose the same responsibility as the latter. The case in 1 *P. Wms.* 244. is the only one in point; but on hat authority, and the justice of the matter itself, under all its circumstances, we are of opinion that, although *Brown* would be chargeable if there were creditors, and a deficiency of assets to satisfy them; yet, that he is not answerable to the legatees.

The £. 400. must therefore be deducted from the account, with the nine years interest which is charged upon it. As to the rest, we think *Brown* ought to be well satisfied to pay the interest; particularly as it is not charged from the year 1776 to the year 1781.

The decision of the *Orphans' Court* was accordingly affirmed; deducting £. 400. and nine years interest, from the account.

SHEWELL *v.* WYCOFF.

THERE was a report in this cause, and at the distance of a month, after Judgment *nisi* had been entered, the Defendant filed reasons in exception to the report.

But, BY THE COURT.—We must not sport with things of so solemn a nature as reports of Referrees, and verdicts of a Jury. The exceptions are much too late. The rule is, that unless they are filed within four days, the Judgment *nisi* becomes absolute.

Sergeant for the Plaintiff—*Bradford* and *Ingersoll* for the Defendant.

ZANE's Exors. *v.* COWPERTHWAITE, Sheriff.

THIS cause had been argued in the last term by *Lewis* and *Ingersoll* for the Plaintiff, and *Rawle* and *Bowie* for the Defendant; and now the CHIEF JUSTICE stated the question, and delivered the opinion of the Court, in the following manner:

M'KEAN, *Chief Justice.*—In this case the executors of *Zane* had issued a *Fieri Facias* against *Joseph Wharton*, to which the present Sheriff made return, that he had levied to the value of the Plaintiff's demand, on specific goods, enumerated in a certain schedule. In consequence of this return, a *Distringas*, directed to the *Coroner*

was issued against the Sheriff, to compel a sale of the goods; and the question that now awaits the determination of the Court, is, whether a *Distringas*, under these circumstances, will lie? 1788.

The case has been well argued: but we are surprised that so few authorities are to be found upon the subject. In searching the books of precedents, indeed, we have remarked, that the *Distringas* uniformly runs against *A. B. nuper vice-comes;* though with this distinction, that, in some instances, it commands him to be distrained 'till he pays the money *into Court*, and, in others, 'till the *late Sheriff* has paid it over to the *present Sheriff*. In 6 *Mod.* 295, Lord *C. J. Holt* says, that after the sheriff has made his return, "levied on specific goods," the regular mode of proceeding is to issue a *Venditioni Exponas;* that where he has returned "levied to the value," he is bound to sell without further process; and that it is usual to issue a *Vend. Exp.* when the Sheriff continues in office, but a *Distringas* when he has left it. In the close of the same case, however, it is likewise *Holt*'s opinion, that a *Distringas* to the *Coroner* will lie, even while the Sheriff, who made the return, is in office. This we mention for the sake of the practice; for, it is certain, that by the *fi. fa.* the Sheriff has authority to sell *the goods* upon which he has levied; the *Venditioni* only giving, by act of Assembly, an additional authority in the case of *lands*.

But we have enquired into the practice of the Courts upon this occasion; and, we find, that it has been the practice of the *Common Pleas*, and, in several instances, of the *Supreme Court*, to issue a *Distringas* to the *Coroner*, where the Sheriff has made a return of goods levied to the value: We are, therefore, of opinion that, in such a case, a *Distringas* will lie.

A *second* point, however, was made in this cause. It appears that a *replevin* for the goods in question, had issued to the *Coroner*, and, that by virtue of that writ, he had taken them out of the possession of the Sheriff; so that the Sheriff was unable either to produce them, or to proceed to a sale.

The *replevin* was highly irregular; an action of *trespass* being the proper remedy for a wrongful levy; for, by an act of Assembly, it is expressly declared, that goods taken in execution shall not be replevied. 2 *State Laws*, 194.

We think, therefore, that as the *replevin* would have been set aside upon motion in the *Common Pleas*; and as the goods were taken from the Sheriff under colour of law, it would be hard to issue a *Distringas* against him, without a previous application to the Court, and its being thereupon awarded. For this reason alone

Let the *Distringas* be quashed.

WILLIAMS *v.* CRAIG.

THIS cause being referred, a report was made in favour of the Plaintiff for a considerable amount, to which the follow-

1788. ing exceptions were filed, and argued on the 12th of *July*, by *J. B. M'Kean*, *Lewis*, and *Ingersoll* for the Defendant; and *Sergeant* and *Coulthurst* for the Plaintiff:

1st, That the referees heard the Plaintiff's witnesses *ex parte*.

2d, That they heard the Plaintiff *ex parte*, without giving notice to the Defendant.

3d, That they have allowed interest upon an unsettled account.

4th, That they refused to allow a set off.

5th, That the Defendant has discovered new and material testimony since the report.

6th, That the referees allowed a charge for premium and commissions in making an insurance for the Defendant, without requiring the Plaintiff to produce the policy, or having any other proof that the insurance was effected, than a letter from the Plaintiff himself to his partner in *Philadelphia*, in which he says he has done it.

As the CHIEF JUSTICE, in delivering the opinion of the Court, adverted to those exceptions which were groundless, or immaterial, and stated those particularly on which their decision was formed, I shall avoid recapitulating the arguments of Council, and only subjoin the authorities on both sides.

M'KEAN, *Chief Justice*.—There are four species of awards: *first*, those made by mutual consent, in pursuance of arbitration bonds entered into out of Court; *secondly*, those which are made in a cause depending in a Court of Law or Equity, upon the consent of the parties to refer the matter in variance (which are awards at common law) *thirdly*, those which are made under a rule of Court, by virtue of the statute of 9 *and* 10. *W.* 3. *c.* 15. which was calculated to remedy the delay and circuity of action attendant upon awards made merely in pursuance of arbitration bonds, without the intervention of a controlling power, to compel the acquiescence of the parties.—These are the only awards in use at this day in *England;* but the Legislature of *Pennsylvania*, in the year 1705, introduced another species here, which are *fourthly*, those awards, or reports, that are made in pursuance of the act of Assembly setting forth, that "where the Plaintiff and Defendant con- "sent to a rule of Court for referring the adjustment of their ac- "counts to certain persons mutually chosen by them in open Court, "the award, or report, of such referees, being made according "to the submission of the parties, *and approved by the Court*, and "entered upon the record, or roll, shall have the same effect, and "be as available in law as a verdict by twelve men." 1 *State Laws*, 48. 4 *Ann. c.* 36.

This act differs essentially from the statute of *W.* 3. in many respects, but particularly, that to render a report, or award, valid and effectual, the former requires, that it be *approved by the Court;* but no such provision is made by the latter, and, therefore, awards under rules of Court, are conclusive in *England*, unless some cor-

ruption, or other misbehaviour, in the arbitrators is proved. The Courts of equity, indeed, have taken a wider ground, and wherever a plain error appears either in matter of fact or law, it seems, they will make it an object of enquiry. 2 *Vern.* 705. 1 *Vern.* 157. 3 *Atk.* 494. From some expressions in the authority, we might presume, that the error must be apparent on the award; but as the Chancellor, at the same time, speaks generally, that it must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject. 1788.

In *Pennsylvania*, however, since the revolution, as the approbation of the Court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to enquire into the allegations against them, before we gave them our sanction. But, in doing this, we have always confined ourselves to two points;—1st, Whether there is an evident mistake in matter of *fact*; or 2dly, Whether the referees have clearly erred in matter of *law*. If either of these is satisfactorily proved, the argument is, surely, as strong for setting a report aside, as where injustice has been done by the corruption, or other misconduct of the referees.

Is it not reasonable, indeed, that the same cause which would induce us to set aside a verdict, and grant a new trial, should be sufficient for vacating an award? In the one case, the decision is made by twelve men upon oath, with all the information which the Judges, and learned Council can communicate:—in the other, it is the act of three persons, who are not sworn to the faithful discharge of their duty, and who are unassisted, either in ascertaining the law, or in developing the fact, upon which the question submitted to them may depend. This abundantly shews that the sacredness of awards ought not to be extended beyond that of verdicts; and must justify the Court in putting them upon the same footing, when errors are suggested either in clear points of law or fact.

If, therefore, we would have granted a new trial, had the present exceptions been made to a verdict, we ought, for the same reasons, to set aside the report in question.

Let us, then, consider the case upon its merits.—The evidence has failed in establishing the *first* and *second* exceptions, which relate to the misconduct of the referees; and, with respect to the *fourth* and *fifth*, though the Court incline to think that the arguments are in favour of the Defendant, yet we do not find it necessary to give any opinion upon these, as we have no doubt, that, for the *third* and *sixth* reasons, the report ought to be set aside.

Thus, under the *third* exception, it has been proved by the statement exhibited by the referees, that interest was allowed to the Plaintiff upon an unliquidated account; which is contrary to the general rule of law, as well as to the repeated decisions of this Court. There are only three cases in which interest can be allowed upon an open account; 1st, where it is payable by the express agreement of the parties; 2dly, where it is payable by a general usage, as in the trade between *England* and *America*, to

1788. which (with an exception during the continuance of the late war) we have uniformly acceded; and 3dly, where there has been a vexatious and unreasonable delay in making payment, which will induce the Court to direct, and the Jury to grant, an adequate compensation, under the name of damages, for which the rate of interest is generally made the rule of computation. The doctrine upon this subject was fully discussed and determined in *Henry Exor.* v. *Risk et al. ant.* 265. We think it establishes a just and useful principle, which tends equally to promote credit, and to prevent feuds and litigations. In transgressing this principle, the referees have mistaken a clear point of law, which would alone be sufficient for setting aside their report.*

But, besides this, we find by the evidence under the *sixth* exception, that they have also allowed the charge of premium and commission for making an insurance, without requiring the policy to be produced, or any proof of its being lost; which is the only evidence that, in such cases, can be admitted in any Court, either of civil or common law jurisdiction. It is, indeed, a fundamental maxim in the laws of evidence (wisely framed for the prevention of frauds) that the best proof, of which the fact reasonably admits, ought to be given. This has not been complied with on the present occasion; and the referees in over-looking it, have violated another plain principle of law.

Upon the whole, as our decision against the Plaintiff can produce no material injury, but if against the Defendant would for ever preclude him from a chance of justice, THE COURT unanimously direct,

That the Report be set aside.

For the *Plaintiff* were cited:—*5 Bac.* 250. 1 *Bac.* 134. 2 *Burr.* 701. *Salk.* 71. 73. 3 *Burr.* 1259. 2 *Vern.* 705. 1 *Vern.* 157. *Bull. L. N. P.* 179. 180. 8 *Vin.* 61. 1 *Atk.* 67. 2 *Vern.* 706. 3 *P. Wms.* 25. 408. 3 *Atk.* 509.

For the *Defendant* were cited:—2 *Vern.* 515. 1 *Atk.* 64. 2 *Vern.* 705. 3 *Atk.* 494. 3 *Burr.* 1259. 5 *Burr.* 2729. 1 *Ld. Ray.* 271. 12 *Vin.* 25. *pl.* 35. *Cowp.* 445. *Doug.* 627. 1 *Show.* 173. 1 *Salk.* 392. *Gilb. L. E.* 4. 5. 16. 17.

PLOWMAN *v.* ABRAMS.

THIS was a *Certiorari* to one of the Justices of the city and county of *Philadelphia*, and the proceedings being returned, it appeared, that *Plowman*, the Defendant, before the Justice, had appealed to the *Common Pleas*, and entered security agreeably to the act of Assembly; but on a certificate from the Prothonotary of that Court, that the appeal was not filed, the Justice issued an execution against the Defendant.

* See *post. Rapelje et al.* v. *Emory*; and the cases there cited in a note.

Dallas moved to quash the execution—*Bankson* and *Heatly* opposed it. 1788.

And, by THE COURT:—After appeal and security given, the Justice cannot issue an execution against the original Defendant, but must proceed against the bail upon the recognizance. Therefore let the proceedings of the Justice be set aside, as far as respects the execution, with costs.

RICHETTE *v.* STEWART *et al.*

THIS was an action upon a policy of insurance on the brig *La Catiche;* and the circumstances of the case, as far as they respect the decision of the Court, were these:—

The brig having sustained considerable damage by a storm, the captain, who was also a part owner, was compelled to deviate from his proper voyage, and, accordingly, bore away for *Cape Francois.* When he arrived there, *on the 28th day of August* 1784, he delivered a *procés verbal* (which had been drawn up at sea, recently after the storm) into the *Admiralty*, in order to obtain a survey of the vessel; but this instrument was merely a relation of facts, unattested by the oath of the captain, or of any of the mariners, who had subscribed it as witnesses. A copy of it being afterwards, however, brought to *Philadelphia*, the captain alone, *on the 4th day of December* 1784, went before a *Notary Public* of this city, and in form of a protest, swore to the authenticity of the copy, and the truth of its contents.

When the present action was instituted, a commission issued to obtain a transcript of the proceedings in the *Admiralty of Cape Francois;* and the *procés verbal* being returned with the other official documents, certified by the Judge under the seal of that Court, the Plaintiff's Council at the trial, which came on the 4th of *July*, offered to read it in evidence to the Jury.

But, it was objected, by the other side, that the *procés verbal*, taken by itself, was not admissible as evidence, because it had not been rendered upon oath; and that, even connecting it with the subsequent protest at *Philadelphia*, it ought, nevertheless, to be rejected; because no protest is valid to this purpose, that has not been made at the first port in which the captain arrives after a misfortune has happened to his vessel. See *Westcote* 432. 1 *Mag.* 87. *Beawes* 140.

The Plaintiff's Council, in reply, observed, that although the strict formalities required in this country, had not been pursued, yet if the proceeding was conformably to the *lex loci* it ought to be received. They contended, therefore, that as the *procés verbal* was lodged in a competent office, and is duly certified under the seal of the admiralty, this Court, in respect to a foreign jurisdiction, is bound to presume that it was regularly taken according to the laws of *France.* Besides, the rule in regard to all ex-

1788. emplifications, rendered it necessary that the whole record should be transmitted and certified; and, whatever may be its weight and effect, the whole ought also to be submitted to the Jury. See *Valin's Ord. de Fr.* 190. *Doug.* 554. *Parke's Insurance* 404. *Bull. N. P.* 227.

By the Court:—Though we had some doubt, at first, whether, connected with the subsequent protest, the *procés verbal* might not be given in evidence, yet we are now convinced that its admission would be highly improper. The declaration of any man, delivered either in a *Pagan*, or *Christian* Court, without the solemnity of an oath, is not evidence of the fact asserted, even where the witness is subject to no bias; much less, where he is immediately interested; as the captain was in the present instance, being a part owner of the vessel.

The case in *Doug.* 554. does not apply to that before us; nor can the *procés verbal* be considered as a judicial proceeding. With respect to the argument, that it is a part of the exemplification, it is sufficient to observe, that if a deed of any kind had been left with the Judge of the *Admiralty*, he would, probably have certified it in the same manner, without meaning, in any degree to establish the validity, or to affect the legal operation of the instrument.

The reading of the *procés verbal* was accordingly over-ruled.

After stating some other points in the cause, the Plaintiff's Council offered to read the protest made in *Philadelphia*, on the 4th day of *December* 1784; to which their opponents likewise objected for the reason already mentioned, that it was not made at the first port, and also on account of the length of time which had intervened.

By the Court:—The question now before us, is, in fact, whether a protest must be made in the first port at which the captain arrives after his vessel has been damaged? This is a matter of great importance, upon which little information can be derived from the books; and, therefore, we were in hopes to have heard it more fully discussed on general principles.

We think, however, that to admit the evidence of a captain of a vessel in excuse of his own conduct, the greatest precaution should be used, and every possible restriction imposed. Hence, it is the rule in *France*, that the protest shall be made within 24 hours after the arrival at the next port; and here, as well as in *England*, it ought to be accompanied by the attestation of a majority of the crew. See *Valines Ord. de. Fr.* 190. 1 *Magens* 160. The reason is evidently to prevent any subsequent collusion; and we cannot but think that it is the safest as well as the most certain mode of proceeding. If, indeed, any particular circumstances should render it impossible to comply, they will always form an exception to the rule; but, as that is not pretended on the present occasion, we are unanimous in rejecting the evidence.

As soon as this decision was pronounced, the Plaintiff voluntarily suffered a *nonsuit*.

Levy, *Ingersoll* and *Sergeant* for the Plaintiff—*Lewis* and *Wilcocks* for the Defendants.*

* See 2 *Dall. Rep.* 196.

1788.

RESPUBLICA v. OSWALD.

ON the 12th of *July*, *Lewis* moved for a rule to shew cause why an attachment should not issue against *Eleazer Oswald*, the printer and publisher of the *Independent Gazetteer*.

The case was this: *Oswald* having inserted in his newspapers several anonymous pieces against the character of *Andrew Browne*, the master of a female academy, in the city of *Philadelphia*, *Browne* applied to him to give up the authors of those pieces; but being refused that satisfaction, he brought an action for the libel against *Oswald*, returnable into the Supreme Court, *on the 2d day of July*; and therein demanded bail for £. 1000. Previously to the return day of the writ, the question of bail being brought by citation before Mr. *Justice* BRYAN, at his chambers, the Judge, on a full hearing of the cause of action, in the presence of both the parties, ordered the Defendant to be discharged on common bail; and the Plaintiff appealed from this order to the Court. Afterwards, *on the 1st of July*, *Oswald* published under his own signature, an address to the public, which contained a narrative of these proceedings, and the following passages, which, I conceive, to have been the material grounds of the present motion.

"When violent attacks are made upon a person under pretext of justice, and legal steps are taken on the occasion, not perhaps to redress the supposed injury, but to feed and gratify partisaning and temporising resentments, it is not unwarrantable in such person to represent the real statement of his case, and appeal to the world for their sentiments and countenance."

"Upon these considerations, principally, I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation *as a printer*, and the *rights of the press* and of *freemen*, are fundamentally struck at; and an earnest endeavour is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies."

"But until the news had arrived last *Thursday*, that the *ninth* state had acceded to the new federal government, I was not called upon; and Mr. *Page* in the afternoon of that day visited me in due form of law with a writ. Had Mr. *Browne* pursued me in this line, "without loss of time," agreeably to his lawyer's letter, I should not have supposed it extraordinary—but to arrest me the moment the *federal* intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has been probably dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. *Browne* was merely the *hand-maid* of some of my enemies among the fede-

1788. ralists; and in this class I must rank, his great patron doctor *Rush* (whose brother is a judge of the *Supreme Court*) I think Mr. *Brown*'s conduct has since confirmed the idea beyond a doubt."

"Enemies I have had in the legal profession, and it may perhaps add to the hopes of *malignity*, that this action is instituted in the *Supreme Court of Pennsylvania.* However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empannelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel on certain memorable occasions, and hope I shall never be a sufferer, let the blast of faction blow with all its furies!"

"The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in *Pennsylvania:* and the vile measures formerly taken to lay me by the heels on this subject only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretence, which oppressive ingenuity or courtly study can invent."

"Upon trial of the cause, the public will decide for themselves, whether Mr. *Browne*'s motives have been laudable and dignified; whether his conduct in declining an acquittal of his character in the paper, and suing me in the manner he did, was decent and consistent; and, in a word, whether he is not actuated by some of my inveterate foes and opponents, to lend his name in their service for the purpose of harassing and injuring me."

A transcript from the records was read to shew that the action between *Browne* and *Oswald* was depending in the Court; *James Martin* proved that the paper containing *Oswald*'s address was bought at his printing office, fresh and damp from the press; and a deposition, made by *Browne*, was read to prove the preceding facts relative to the cause of action, the hearing before Mr. *Justice* BRYAN, and the appeal from his order.

Lewis then adverted to the various pieces, which were charged as libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed; yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of *Browne*, to whom the education of more than a hundred children was sometimes entrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions of his character; and he inferred the necessity of the action, which had been instituted, from this consideration, that if *Browne* were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that

was issued against the Sheriff, to compel a sale of the goods; and the question that now awaits the determination of the Court, is, whether a *Distringas*, under these circumstances, will lie? 1788.

The case has been well argued: but we are surprised that so few authorities are to be found upon the subject. In searching the books of precedents, indeed, we have remarked, that the *Distringas* uniformly runs against *A. B. nuper vice-comes;* though with this distinction, that, in some instances, it commands him to be distrained 'till he pays the money *into Court*, and, in others, 'till the *late Sheriff* has paid it over to the *present Sheriff*. In 6 *Mod.* 295, Lord *C. J. Holt* says, that after the sheriff has made his return, "levied on specific goods," the regular mode of proceeding is to issue a *Venditioni Exponas;* that where he has returned "levied to the value," he is bound to sell without further process; and that it is usual to issue a *Vend. Exp.* when the Sheriff continues in office, but a *Distringas* when he has left it. In the close of the same case, however, it is likewise *Holt*'s opinion, that a *Distringas* to the *Coroner* will lie, even while the Sheriff, who made the return, is in office. This we mention for the sake of the practice; for, it is certain, that by the *fi. fa.* the Sheriff has authority to sell *the goods* upon which he has levied; the *Venditioni* only giving, by act of Assembly, an additional authority in the case of *lands*.

But we have enquired into the practice of the Courts upon this occasion; and, we find, that it has been the practice of the *Common Pleas*, and, in several instances, of the *Supreme Court*, to issue a *Distringas* to the *Coroner*, where the Sheriff has made a return of goods levied to the value: We are, therefore, of opinion that, in such a case, a *Distringas* will lie.

A *second* point, however, was made in this cause. It appears that a *replevin* for the goods in question, had issued to the *Coroner*, and, that by virtue of that writ, he had taken them out of the possession of the Sheriff; so that the Sheriff was unable either to produce them, or to proceed to a sale.

The *replevin* was highly irregular; an action of *trespass* being the proper remedy for a wrongful levy; for, by an act of Assembly, it is expressly declared, that goods taken in execution shall not be replevied. 2 *State Laws*, 194.

We think, therefore, that as the *replevin* would have been set aside upon motion in the *Common Pleas*; and as the goods were taken from the Sheriff under colour of law, it would be hard to issue a *Distringas* against him, without a previous application to the Court, and its being thereupon awarded. For this reason alone

Let the *Distringas* be quashed.

WILLIAMS *v.* CRAIG.

THIS cause being referred, a report was made in favour of the Plaintiff for a considerable amount, to which the follow-

1788. ing exceptions were filed, and argued on the 12th of *July*, by *J. B. M'Kean*, *Lewis*, and *Ingersoll* for the Defendant; and *Sergeant* and *Coulthurst* for the Plaintiff:

1st, That the referees heard the Plaintiff's witnesses *ex parte*.

2d, That they heard the Plaintiff *ex parte*, without giving notice to the Defendant.

3d, That they have allowed interest upon an unsettled account.

4th, That they refused to allow a set off.

5th, That the Defendant has discovered new and material testimony since the report.

6th, That the referees allowed a charge for premium and commissions in making an insurance for the Defendant, without requiring the Plaintiff to produce the policy, or having any other proof that the insurance was effected, than a letter from the Plaintiff himself to his partner in *Philadelphia*, in which he says he has done it.

As the CHIEF JUSTICE, in delivering the opinion of the Court, adverted to those exceptions which were groundless, or immaterial, and stated those particularly on which their decision was formed, I shall avoid recapitulating the arguments of Council, and only subjoin the authorities on both sides.

M'KEAN, *Chief Justice*.—There are four species of awards: *first*, those made by mutual consent, in pursuance of arbitration bonds entered into out of Court; *secondly*, those which are made in a cause depending in a Court of Law or Equity, upon the consent of the parties to refer the matter in variance (which are awards at common law) *thirdly*, those which are made under a rule of Court, by virtue of the statute of 9 *and* 10. *W.* 3. *c.* 15. which was calculated to remedy the delay and circuity of action attendant upon awards made merely in pursuance of arbitration bonds, without the intervention of a controlling power, to compel the acquiescence of the parties.—These are the only awards in use at this day in *England;* but the Legislature of *Pennsylvania*, in the year 1705, introduced another species here, which are *fourthly*, those awards, or reports, that are made in pursuance of the act of Assembly setting forth, that "where the Plaintiff and Defendant consent to a rule of Court for referring the adjustment of their accounts to certain persons mutually chosen by them in open Court, the award, or report, of such referees, being made according to the submission of the parties, *and approved by the Court*, and entered upon the record, or roll, shall have the same effect, and be as available in law as a verdict by twelve men." 1 *State Laws*, 48. 4 *Ann. c.* 36.

This act differs essentially from the statute of *W.* 3. in many respects, but particularly, that to render a report, or award, valid and effectual, the former requires, that it be *approved by the Court;* but no such provision is made by the latter, and, therefore, awards under rules of Court, are conclusive in *England*, unless some cor-

ruption, or other misbehaviour, in the arbitrators is proved. The Courts of equity, indeed, have taken a wider ground, and wherever a plain error appears either in matter of fact or law, it seems, they will make it an object of enquiry. 2 *Vern.* 705. 1 *Vern.* 157. 3 *Atk.* 494. From some expressions in the authority, we might presume, that the error must be apparent on the award; but as the Chancellor, at the same time, speaks generally, that it must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject. 1788.

In *Pennsylvania*, however, since the revolution, as the approbation of the Court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to enquire into the allegations against them, before we gave them our sanction. But, in doing this, we have always confined ourselves to two points;—1st, Whether there is an evident mistake in matter of *fact*; or 2dly, Whether the referees have clearly erred in matter of *law*. If either of these is satisfactorily proved, the argument is, surely, as strong for setting a report aside, as where injustice has been done by the corruption, or other misconduct of the referees.

Is it not reasonable, indeed, that the same cause which would induce us to set aside a verdict, and grant a new trial, should be sufficient for vacating an award? In the one case, the decision is made by twelve men upon oath, with all the information which the Judges, and learned Council can communicate:—in the other, it is the act of three persons, who are not sworn to the faithful discharge of their duty, and who are unassisted, either in ascertaining the law, or in developing the fact, upon which the question submitted to them may depend. This abundantly shews that the sacredness of awards ought not to be extended beyond that of verdicts; and must justify the Court in putting them upon the same footing, when errors are suggested either in clear points of law or fact.

If, therefore, we would have granted a new trial, had the present exceptions been made to a verdict, we ought, for the same reasons, to set aside the report in question.

Let us, then, consider the case upon its merits.—The evidence has failed in establishing the *first* and *second* exceptions, which relate to the misconduct of the referees; and, with respect to the *fourth* and *fifth*, though the Court incline to think that the arguments are in favour of the Defendant, yet we do not find it necessary to give any opinion upon these, as we have no doubt, that, for the *third* and *sixth* reasons, the report ought to be set aside.

Thus, under the *third* exception, it has been proved by the statement exhibited by the referees, that interest was allowed to the Plaintiff upon an unliquidated account; which is contrary to the general rule of law, as well as to the repeated decisions of this Court. There are only three cases in which interest can be allowed upon an open account; 1st, where it is payable by the express agreement of the parties; 2dly, where it is payable by a general usage, as in the trade between *England* and *America*, to

1788. which (with an exception during the continuance of the late war) we have uniformly acceded; and 3dly, where there has been a vexatious and unreasonable delay in making payment, which will induce the Court to direct, and the Jury to grant, an adequate compensation, under the name of damages, for which the rate of interest is generally made the rule of computation. The doctrine upon this subject was fully discussed and determined in *Henry Exor.* v. *Risk et al. ant.* 265. We think it establishes a just and useful principle, which tends equally to promote credit, and to prevent feuds and litigations. In transgressing this principle, the referees have mistaken a clear point of law, which would alone be sufficient for setting aside their report.*

But, besides this, we find by the evidence under the *sixth* exception, that they have also allowed the charge of premium and commission for making an insurance, without requiring the policy to be produced, or any proof of its being lost; which is the only evidence that, in such cases, can be admitted in any Court, either of civil or common law jurisdiction. It is, indeed, a fundamental maxim in the laws of evidence (wisely framed for the prevention of frauds) that the best proof, of which the fact reasonably admits, ought to be given. This has not been complied with on the present occasion; and the referees in over-looking it, have violated another plain principle of law.

Upon the whole, as our decision against the Plaintiff can produce no material injury, but if against the Defendant would for ever preclude him from a chance of justice, THE COURT unanimously direct,

That the Report be set aside.

For the *Plaintiff* were cited:—*5 Bac.* 250. 1 *Bac.* 134. 2 *Burr.* 701. *Salk.* 71. 73. 3 *Burr.* 1259. 2 *Vern.* 705. 1 *Vern.* 157. *Bull. L. N. P.* 179. 180. 8 *Vin.* 61. 1 *Atk.* 67. 2 *Vern.* 706. 3 *P. Wms.* 25. 408. 3 *Atk.* 509.

For the *Defendant* were cited:—2 *Vern.* 515. 1 *Atk.* 64. 2 *Vern.* 705. 3 *Atk.* 494. 3 *Burr.* 1259. 5 *Burr.* 2729. 1 *Ld. Ray.* 271. 12 *Vin.* 25. *pl.* 35. *Coup.* 445. *Doug.* 627. 1 *Show.* 173. 1 *Salk.* 392. *Gilb. L. E.* 4. 5. 15. 17.

PLOWMAN *v.* ABRAMS.

THIS was a *Certiorari* to one of the Justices of the city and county of *Philadelphia*, and the proceedings being returned, it appeared, that *Plowman*, the Defendant, before the Justice, had appealed to the *Common Pleas*, and entered security agreeably to the act of Assembly; but on a certificate from the Prothonotary of that Court, that the appeal was not filed, the Justice issued an execution against the Defendant.

* See *post. Rapelje et al.* v. *Emory*; and the cases there cited in a note.

Dallas moved to quash the execution—*Bankson* and *Heatly* opposed it. 1788.

And, by THE COURT:—After appeal and security given, the Justice cannot issue an execution against the original Defendant, but must proceed against the bail upon the recognizance. Therefore let the proceedings of the Justice be set aside, as far as respects the execution, with costs.

RICHETTE *v.* STEWART *et al.*

THIS was an action upon a policy of insurance on the brig *La Catiche;* and the circumstances of the case, as far as they respect the decision of the Court, were these:—

The brig having sustained considerable damage by a storm, the captain, who was also a part owner, was compelled to deviate from his proper voyage, and, accordingly, bore away for *Cape Francois.* When he arrived there, *on the 28th day of August* 1784, he delivered a *procés verbal* (which had been drawn up at sea, recently after the storm) into the *Admiralty*, in order to obtain a survey of the vessel; but this instrument was merely a relation of facts, unattested by the oath of the captain, or of any of the mariners, who had subscribed it as witnesses. A copy of it being afterwards, however, brought to *Philadelphia*, the captain alone, *on the 4th day of December* 1784, went before a *Notary Public* of this city, and in form of a protest, swore to the authenticity of the copy, and the truth of its contents.

When the present action was instituted, a commission issued to obtain a transcript of the proceedings in the *Admiralty of Cape Francois;* and the *procés verbal* being returned with the other official documents, certified by the Judge under the seal of that Court, the Plaintiff's Council at the trial, which came on the 4th of *July*, offered to read it in evidence to the Jury.

But, it was objected, by the other side, that the *procés verbal*, taken by itself, was not admissible as evidence, because it had not been rendered upon oath; and that, even connecting it with the subsequent protest at *Philadelphia*, it ought, nevertheless, to be rejected; because no protest is valid to this purpose, that has not been made at the first port in which the captain arrives after a misfortune has happened to his vessel. See *Westcote* 432. 1 *Mag.* 87. *Beawes* 140.

The Plaintiff's Council, in reply, observed, that although the strict formalities required in this country, had not been pursued, yet if the proceeding was conformably to the *lex loci* it ought to be received. They contended, therefore, that as the *procés verbal* was lodged in a competent office, and is duly certified under the seal of the admiralty, this Court, in respect to a foreign jurisdiction, is bound to presume that it was regularly taken according to the laws of *France.* Besides, the rule in regard to all ex-

1788. emplifications, rendered it necessary that the whole record should be transmitted and certified; and, whatever may be its weight and effect, the whole ought also to be submitted to the Jury. See *Valin's Ord. de Fr.* 190. *Doug.* 554. *Parke's Insurance* 404. *Bull. N. P.* 227.

By the Court:—Though we had some doubt, at first, whether, connected with the subsequent protest, the *procés verbal* might not be given in evidence, yet we are now convinced that its admission would be highly improper. The declaration of any man, delivered either in a *Pagan*, or *Christian* Court, without the solemnity of an oath, is not evidence of the fact asserted, even where the witness is subject to no bias; much less, where he is immediately interested; as the captain was in the present instance, being a part owner of the vessel.

The case in *Doug.* 554. does not apply to that before us; nor can the *procés verbal* be considered as a judicial proceeding. With respect to the argument, that it is a part of the exemplification, it is sufficient to observe, that if a deed of any kind had been left with the Judge of the *Admiralty*, he would, probably have certified it in the same manner, without meaning, in any degree to establish the validity, or to affect the legal operation of the instrument.

The reading of the *procés verbal* was accordingly over-ruled.

After stating some other points in the cause, the Plaintiff's Council offered to read the protest made in *Philadelphia*, on the 4th day of *December* 1784; to which their opponents likewise objected for the reason already mentioned, that it was not made at the first port, and also on account of the length of time which had intervened.

By the Court:—The question now before us, is, in fact, whether a protest must be made in the first port at which the captain arrives after his vessel has been damaged? This is a matter of great importance, upon which little information can be derived from the books; and, therefore, we were in hopes to have heard it more fully discussed on general principles.

We think, however, that to admit the evidence of a captain of a vessel in excuse of his own conduct, the greatest precaution should be used, and every possible restriction imposed. Hence, it is the rule in *France*, that the protest shall be made within 24 hours after the arrival at the next port; and here, as well as in *England*, it ought to be accompanied by the attestation of a majority of the crew. See *Valines Ord. de. Fr.* 190. 1 *Magens* 160. The reason is evidently to prevent any subsequent collusion; and we cannot but think that it is the safest as well as the most certain mode of proceeding. If, indeed, any particular circumstances should render it impossible to comply, they will always form an exception to the rule; but, as that is not pretended on the present occasion, we are unanimous in rejecting the evidence.

As soon as this decision was pronounced, the Plaintiff voluntarily suffered a *nonsuit*.

Levy, *Ingersoll* and *Sergeant* for the Plaintiff—*Lewis* and *Wilcocks* for the Defendants.*

* See 2 *Dall. Rep.* 196.

1788.

RESPUBLICA *v.* OSWALD.

ON the 12th of *July*, *Lewis* moved for a rule to shew cause why an attachment should not issue against *Eleazer Oswald*, the printer and publisher of the *Independent Gazetteer*.

The case was this: *Oswald* having inserted in his newspapers several anonymous pieces against the character of *Andrew Browne*, the master of a female academy, in the city of *Philadelphia*, *Browne* applied to him to give up the authors of those pieces; but being refused that satisfaction, he brought an action for the libel against *Oswald*, returnable into the Supreme Court, *on the 2d day of July;* and therein demanded bail for £. 1000. Previously to the return day of the writ, the question of bail being brought by citation before Mr. *Justice* BRYAN, at his chambers, the Judge, on a full hearing of the cause of action, in the presence of both the parties, ordered the Defendant to be discharged on common bail; and the Plaintiff appealed from this order to the Court. Afterwards, *on the 1st of July*, *Oswald* published under his own signature, an address to the public, which contained a narrative of these proceedings, and the following passages, which, I conceive, to have been the material grounds of the present motion.

"When violent attacks are made upon a person under pretext of justice, and legal steps are taken on the occasion, not perhaps to redress the supposed injury, but to feed and gratify partisaning and temporising resentments, it is not unwarrantable in such person to represent the real statement of his case, and appeal to the world for their sentiments and countenance."

"Upon these considerations, principally, I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation *as a printer*, and the *rights of the press* and of *freemen*, are fundamentally struck at; and an earnest endeavour is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies."

"But until the news had arrived last *Thursday*, that the *ninth* state had acceded to the new federal government, I was not called upon; and Mr. *Page* in the afternoon of that day visited me in due form of law with a writ. Had Mr. *Browne* pursued me in this line, "without loss of time," agreeably to his lawyer's letter, I should not have supposed it extraordinary—but to arrest me the moment the *federal* intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has been probably dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. *Browne* was merely the *hand-maid* of some of my enemies among the fede-

1788. ralists; and in this class I must rank, his great patron doctor *Rush* (whose brother is a judge of the *Supreme Court*) I think Mr. *Brown*'s conduct has since confirmed the idea beyond a doubt."

"Enemies I have had in the legal profession, and it may perhaps add to the hopes of *malignity*, that this action is instituted in the *Supreme Court of Pennsylvania*. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empannelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel on certain memorable occasions, and hope I shall never be a sufferer, let the blast of faction blow with all its furies!"

"The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in *Pennsylvania:* and the vile measures formerly taken to lay me by the heels on this subject only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretence, which oppressive ingenuity or courtly study can invent."

"Upon trial of the cause, the public will decide for themselves, whether Mr. *Browne*'s motives have been laudable and dignified; whether his conduct in declining an acquittal of his character in the paper, and suing me in the manner he did, was decent and consistent; and, in a word, whether he is not actuated by some of my inveterate foes and opponents, to lend his name in their service for the purpose of harassing and injuring me."

A transcript from the records was read to shew that the action between *Browne* and *Oswald* was depending in the Court; *James Martin* proved that the paper containing *Oswald*'s address was bought at his printing office, fresh and damp from the press; and a deposition, made by *Browne*, was read to prove the preceding facts relative to the cause of action, the hearing before Mr. *Justice* BRYAN, and the appeal from his order.

Lewis then adverted to the various pieces, which were charged as libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed; yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of *Browne*, to whom the education of more than a hundred children was sometimes entrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions of his character; and he inferred the necessity of the action, which had been instituted, from this consideration, that if *Browne* were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that

he owed to himself and to the public to vindicate his reputation, and to call upon the justice of the laws, to punish so gross a violation of truth and decency. For this purpose, he continued, a writ had been issued, and bail was required. The Defendant, if not before, was certainly, on the hearing at the Judge's chambers, apprized of the cause of action: The order of Mr. *Justice* BRYAN on that occasion, and the appeal to the Court, were circumstances perfectly within his knowledge; and yet, while the whole merits of the cause were thus in suspense, he thought proper to address the public in language evidently calculated to excite the popular resentment against *Browne*; to create doubts and suspicions of the integrity and impartiality of the Judges who must preside upon the trial; and to promote an unmerited compassion in his own favour. He has described himself as the object of former persecutions upon similar principles; he has asserted that, in this instance, an individual is made the instrument of a party to destroy him; and he artfully calls upon his fellow citizens to interest themselves to preserve the freedom of the press, which he considers as attacked in his person. Nay, in order to cast an odium upon the new government of the *United States*, he insinuates, that his arrest was purposely protracted 'till the ratification of nine states had given stability to that system; a falsehood, as unwarrantable as it is insidious; for, it will be proved that this delay took place at his own request, communicated by Col. *Proctor*. 1788.

Col. *Proctor*, being examined on this point, said, that he, at first, desired the action might not be brought, in hopes of accomplishing a compromise between the parties; that, afterwards, he requested Mr. *Lewis* to defer issuing the writ 'till as near the term as it was possible: but that all this interference was of his own accord, and not at the instance of the Defendant. He acknowledged, however, that he had informed *Oswald*, that the commencement of the action would be postponed as long as possible, after having obtained a promise to that effect from Mr. *Lewis*.

Lewis said he was very much mistaken, indeed, if Col. *Proctor* had not mentioned the request as coming from the Defendant; and Col. *Proctor* answered, "if ever I told you so, he cer-" tainly sent me; but I cannot remember that ever he asked me " to do a thing of the kind."

Lewis then added, that the address to the public manifestly tended to interrupt the course of justice; it was an attempt to prejudice the minds of the people in a cause then depending, and, by that means, to defeat the Plaintiff's claim to justice, and to stigmatize the Judges, whose duty it was to administer the laws. There could be no doubt, therefore, that it amounted to a contempt of the Court; and it only remained, in support of his motion, to shew that an attachment was the legal mode of proceeding against the offender. For this he cited 4 *Black. Com.* 280. 2 *Atk.* 469.

BY THE COURT:—Take a rule to shew cause on *Monday* next, at 9 o'clock in the morning.

1788. The Defendant appearing on *Monday* the 14th, agreeably to the rule to shew cause, obtained on *Saturday*, prayed that the rule might be enlarged, as he had not had a reasonable time to prepare for the argument. But *Lewis* opposed the enlargement of the rule, observing that the Defendant would be heard in extenuation, or excuse, of the contempt, after the attachment had issued.

By M'KEAN, *C. J.*—I know not of any instance where a delay of a term has been allowed in the case of an attachment: one reason for such a summary proceeding is to prevent delay. Let cause be now shewn.

Sergeant, in shewing cause against the attachment, contended, that the doctrine, in 4 *Black. Com.* 280. was laid down much too wide; that in 2 *Atk.* 469. the Chancellor expressly assigns this reason, for his determining without a jury, that he was a judge of *fact*; and in 1 *Burr.* 510. 513. an information is granted on this principle, that Courts of common law will not decide upon facts without the intervention of a jury.

M'KEAN, *C. J.*—This was not the reason that influenced the Court in their decision.

But, whatever the law might be in *England*, *Sergeant* insisted, that it could not avail in *Pennsylvania*. Even in *England*, indeed, though it is said to be a contempt to report the decisions of the Courts, unless under the *imprimatur* of the judges; yet, we find *Burrow*, and all the subsequent reporters, proceeding without that sanction. But the constitution of *Pennsylvania* authorizes many things to be done which in *England* are prohibited. Here the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of the government; of which the judicial authority is certainly to be considered as a branch. *Const. Penn. Sect.* 35.

M'KEAN, *C. J.*—Could not this be done in *England?* Certainly it could: for, in short, there is nothing in the constitution of this state, respecting the liberty of the press, that has not been authorized by the constitution of that kingdom for near a century past.

Sergeant. The 9th *section of the Bill of Rights*, however, puts this supposed offence into such a form, as must entitle the Defendant to a trial by jury; and precludes every attempt to compel him to give evidence against himself. It declares, "that, in "all prosecutions for *criminal offences*, a man has a right to be "heard by himself and his Council, to demand the cause and "nature of his accusation, to be confronted with the witnesses, "to call for evidence in his favour, and a speedy public trial, *by* "*an impartial jury of the country*, without the *unanimous* consent "of which jury he cannot be found guilty; *nor can he be compel-* "*led to give evidence against himself;* nor can any man be justly "deprived of his liberty except by the laws of the land, or the "judgment of his peers."—Now, the present proceeding against the Defendant is for a *criminal offence*; and, yet, if the attachment issues, the essential parts of this section must be defeated: for, in that case, the Defendant *cannot be tried by a jury;* and,

according to the practice upon attachments, he will *be compelled to answer interrogatories;* in doing which, he must either be guilty of perjury, or *give evidence against himself.* The proceeding by attachment is, indeed, a novelty in this country, except for the purpose of enforcing the attendance of witnesses. Those contempts which are committed in the face of a Court stand upon a very different ground. Even the Court of *Admiralty* (which is not a Court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alleged to have been committed out of doors, are not within this reason; they come properly within the class of *criminal offences;* and, as such, by the 9th *sect.* of the bill of rights, they can only be tried by a jury. 1788.

M'KEAN, *C. J.* Do you then apprehend that the 9th *sect.* of the bill of rights introduced something new on the subject of *trials?* I have always understood it to be the law, independent of this section, that the twelve jurors must be *unanimous* in their verdict, and yet this section makes this express provision.

Sergeant said, that he had discussed the subject as well as the little opportunity afforded him would admit. He pressed the Court to give further time for the argument, or, at once, to direct a trial. This he contended was, at least, discretionary; and, considering the Defendant's protestation of innocence,* his readiness to give ample security for his future appearance, the magnitude of the question as arising from the constitution, and its immense consequences to the public, he thought a delay, that was essential to deliberation and justice, ought not to be refused.

Heatly and *Lewis*, in support of the motion, contended, that under the circumstances of the case, *Oswald*'s publication, whether true or false, amounted to a contempt of the Court, as it respected a cause then depending in judgment, and reflected upon one of the Judges in his official capacity; that the argument of the adverse Council went so far as to assert, that there could be no such offence as a contempt even in *England*, since the very words inserted in the constitution of *Pennsylvania*, were used in the *Magna Charta* of that kingdom; that, in truth, neither the bill of rights nor the constitution extended to the case of *contempts*, for they mean only to secure to every citizen the right of expressing his sentiments with a manly freedom, but not to authorize wanton attacks upon private reputation, or to deprive the Court of a power essential to its own existence, and to the due administration of justice; that the Court were as competent to judge of the fact and the law, upon the inspection of the publication in question, as *the Chancellor* was in the authority cited from *Atkins;* and that although the prosecutor could, perhaps, proceed either by indictment or information, yet that the abuses of the *Star Chamber* had rendered the process by information odious, and

* Mr. *Oswald* repeatedly declared that he meant no contempt of the Court in what he had published.

1788. an attachment, which was sanctified by immemorial usage, was the most expeditious, and, therefore, the most proper remedy for the evil complained of.

The CHIEF JUSTICE delivered the opinion of the Court to the following effect, Judge BRYAN having shortly before taken his seat.

M'KEAN, *C. J.*—This is a motion for an attachment against *Eleazer Oswald*, the printer and publisher of *the Independent Gazetteer*, of the 1st of *July* last, No. 796. As a ground for granting the attachment, it is proved, that an action for a libel had been instituted in this Court, in which *Andrew Browne* is the Plaintiff, and *Eleazer Oswald* the Defendant; that a question with respect to bail in that action, had been agitated before one of the Judges, from whose order, discharging the Defendant on common bail, the Plaintiff had appealed to the Court; and that Mr. *Oswald*'s address to the public, which is the immediate subject of complaint, relates to the action thus depending before us.

The Council in support of their motion, have argued, that this address was intended to prejudice the public mind upon the merits of the cause, by propagating an opinion that *Browne* was the instrument of a party to persecute and destroy the Defendant; that he acted under the particular influence of Dr. *Rush*, whose brother is a judge of this Court; and, in short, that from the ancient prejudices of all the judges, the Defendant did not stand a chance of a fair trial.

Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. Let us, therefore, enquire, *first*, whether they ought to be considered as a contempt of the Court; and, *secondly*, whether, if so, the offender is punishable by attachment.

And here, I must be allowed to observe, that libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeller admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? how shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antedote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to *vindicate*, which has been employed to *defame* him; for, many will read the charge, who may never see the answer;

and while the object of accusation is publicly pointed at, the malicious and malignant author, rests in the dishonourable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeller, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—no! 1788.

What then is the meaning of *the Bill of Rights*, and *the Constitution* of *Pennsylvania*, when they declare, "That the freedom of the press shall not be restrained,"* and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government?" † However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a *licenser*. The same principles were settled in *England*, so far back as the reign of *William the third*, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there any thing in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the proceedings of government, extends to warrant an anticipation of the acts of the Legislature, or the judgments of the Court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavour to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he, who attempts to raise a prejudice against his antagonist, in the minds of those that must

* Declar. of Rights, s. 12. † Constit. of Penn. s. 35.

1788. ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice.—wilfully seeks to corrupt the source, and to dishonour the administration of justice.

Such is evidently the object and tendency of Mr. *Oswald*'s address to the public. Nor can that artifice prevail, which insinuates that the decision of this Court will be the effect of personal resentment; for, if it could, every man might evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion, because their treatment has been such as would naturally excite resentment in the human disposition. But it must be remembered, that judges discharge their functions under the solemn obligations of an oath: and, if their virtue entitles them to their station, they can neither be corrupted by favour to swerve from, nor influenced by fear to desert their duty. That judge, indeed, who courts popularity by unworthy means, while he weakens his pretensions, diminishes, likewise, the chance of attaining his object; and he will eventually find that he has sacrificed the substantial blessing of a good conscience, in an idle and visionary pursuit.

Upon the whole, we consider the publication in question, as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be summoned as jurors) with respect to the merits of a cause depending in this Court, and of corrupting the administration of justice: We are, therefore, unanimously of opinion, on the *first* point, that it amounts to a contempt.

It only remains then to consider, whether the offence is punishable in the way that the present motion has proposed.

It is certain that the proceeding by *attachment* is as old as the law itself, and no act of the Legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares, that "trials by jury shall be as *heretofore*;" and surely it cannot be contended, that the offence, with which the Defendant is now charged, was *heretofore* tried by that tribunal. If a man commits an outrage in the face of the Court, what is there to be tried?—what further evidence can be necessary to convict him of the offence, than the actual view of the Judges? A man has been compelled to enter into security for his good behaviour, for giving the lie in the presence of the Judges in *Westminster-Hall*.

On the present occasion, is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt, or not, is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in

his misconduct. The injurious consequences might then be justly imputed to the Court, for refusing to exercise their legal power in preventing them. 1788.

For these reasons we have no doubt of the competency of our jurisdiction; and we think, that justice and propriety call upon us to proceed by *attachment*.

BRYAN, *Justice*, observed, that he did not mean to give an opinion as to the mode of proceeding; but added, that he had always entertained a doubt with respect to the legality of the process by attachment, in such cases, under the constitution of Pennsylvania.

M'KEAN, *C. J.* Will the Defendant enter into a recognizance to answer interrogatories, or will he answer *gratis*?

Oswald. I will not answer interrogatories. Let the attachment issue. *

M'KEAN, *C. J.* His Council had better advise him to consider of it.

Sergeant said that the Defendant had not had time, even to peruse what had been sworn against him; for only *Sunday* had intervened since the obtaining the rule to shew cause, and that was an improper day for applying to the records of the Court.

M'KEAN, *C. J.* In criminal matters *Sunday* has always been deemed a legal day. There has been as ample time for consideration as could well be allowed; the term will end to-morrow. Will he answer, or not?

Sergeant prayed the Court would grant 'till to-morrow morning to form a determination on the subject, and offered bail for the Defendant's appearance at that time.

M'KEAN, *C. J.* Be it so. Let the bail be taken, himself in £. 200, and one surety in the like sum, for his appearance to-morrow morning.

The Defendant appearing on the 15th of *July*, in discharge of his recognizance; the CHIEF JUSTICE again asked, whether he would answer interrogatories or not?

Bankson, for the Defendant, requested, that the interrogatories might be reduced to writing before he was called upon determine.

M'KEAN, *C. J.* Is that your advice to him? He must *now* say whether he will answer them or not; they will be filed according to the usage of the Court, and all just exceptions to them will be allowed.

Bankson. He instructs me to declare that he will not answer interrogatories; and he then began to urge, that there was no contempt committed, but was told by the CHIEF JUSTICE, that, as

* At this period of the cause, I am informed by a gentleman of great learning and accuracy, that the Court called for the sheriff in order to commit the Defendant; but the transition from that idea to the advice which fell from the bench, must have been so instantaneous, that, if I heard that call, I presume I did not consider it as a part of the proceedings, and therefore omitted it in my notes. If it is of any importance, I am happy in the opportunity of supplying this defect.

1788. that point had been determined by an unanimous opinion of the four judges yesterday, it was not now open for argument.

Lewis said, that as a misrepresentation had been industriously spread abroad respecting the conduct of the Court, he thought it proper, at this time, concisely to state the real nature of the present proceedings. It has been asserted that the Court were about to compel Mr. *Oswald* to convict himself of the offence with which he is charged: but the fact is this, that it is incumbent upon the person who suggests the contempt to prove it by disinterested witnesses; and then, indeed, the Defendant is allowed by his own oath to purge and acquit himself, in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. *Oswald*'s being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done) but to enable him to avoid the punishment which is the consequence of it. The Court employ no compulsion in this respect. He may either answer, or not, as he pleases: if he does answer, his single oath, in his own favour, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the judgment of that Court must necessarily follow.

M'KEAN, *C. J.* Your statement is certainly right, and the misrepresentation, which is attempted, must either be the effect of wickedness, or ignorance.

Lewis now prayed, that the rule might be made absolute; but remarked, that, according to the authorities, the Court might either do that; or, as the Defendant was present, they might proceed at once to pass sentence upon him.

M'KEAN, *C. J.* There can be no occasion, when the party is present, to make the rule for the attachment absolute: the Court will proceed to give judgment.

BRYAN, *Justice.* I was not here when the complaint was made to the Court, when the evidence in support of the motion was produced, or the arguments against it were delivered: I consider myself therefore totally incapacitated for taking any part in this business.

Lewis. We can immediately furnish the Court with the proofs.

BRYAN, *Justice.* Can you furnish me, likewise, with Mr. *Sergeant*'s arguments?

Lewis said, that he had not penetration enough to discover any argument in what had been said for the Defendant; and having again read all the evidence which had been produced, he recapitulated what he had before said in support of the motion.

Page, the under-sheriff, was then called upon to prove, that the writ in the action of *Browne* v. *Oswald* had been in his possession, at least twelve days before it was served; and that the delay in serving it arose at first, from the Defendant's being at *Baltimore;* and, afterwards, from his not being at home when the witness had repeatedly called upon him.

BRYAN, *Justice.* I still say, that not having heard what has been offered in extenuation of the offence, I am incompetent to join in any opinion respecting the punishment. I cannot surely be suspected of partiality to libellers: I have had my share of their malevolence. But, it is true, I have not suffered much; for these trifles do not wrankle in my mind. 1788.

The CHIEF JUSTICE pronounced the judgment of the Court in the following words:

M'KEAN, *C. J.—Eleazer Oswald:* Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the Court. Some doubts were suggested, whether, even a contempt of the Court, was punishable by attachment: but, not only my brethren and myself, but, likewise, all the judges of *England*, think, that without this power no Court could possibly exist:—nay, that no *contempt* could, indeed, be committed against us, we should be *so truly contemptible.* The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt.

But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct: your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.

Upon the whole, therefore, THE COURT pronounce this sentence:—That you pay a fine of 10*l.* to the *Commonwealth*; that you be imprisoned for the space of one month, that is, from the 15th day of *July* to the 15th day of *August* next; and, afterwards, till the fine and costs are paid.—Sheriff, he is in your custody.*

* The sentence, on the point of imprisonment, was entered upon the record *for the space of one month*, without taking notice of the explanatory words used by the Court. At the expiration of the legal month, (28 days) Mr *Oswald* demanded his discharge; but with this the Sheriff, who had heard the sentence pronounced, refused to comply, 'till he had consulted the CHIEF JUSTICE. His honour, remembering the meaning and words of the Court, told this officer, at first, that he was bound to detain his prisoner 'till the morning of the 15th of *August*; but, having shortly afterwards examined the record, he wrote to the Sheriff, that Mr. *Oswald*, agreeably to the entry there, was entitled to his discharge.

On the 5th of *September* 1788, Mr. *Oswald* presented a memorial to the *General Assembly*, in which he stated the proceedings against him, complained of the decision of three of the Judges of the Court, in the principal case, and of the direction of the CHIEF JUSTICE to the Sheriff, by which, he alleged, his confinement had afterwards been illegally protracted:—finally calling upon the house to determine, "whether the Judges did not infringe the constitution in *direct* terms in the sentence

1788.

LESHER v. GEHR.

THE *Venue* in this case was laid in *Philadelphia*, and Judgment being entered, an execution was thereupon issued immediately into *Bucks* county.

Sergeant obtained a rule to shew cause, why the execution should not be quashed, alleging that it ought to have been preceded by a *Fi. Fa.* in the county where the *Venue* was laid, in order to ground a *Testatum* into *Bucks*.

" they had pronounced; and whether, of course, they had not made themselves " proper objects of impeachment."

The Assembly, having previously appointed a committee to report the order of proceeding on Mr. *Oswald*'s memorial, resolved itself into a committee of the whole, to hear the evidence in support of the charges exhibited. Three days were consumed in the examination of witnesses, during which, the above report was substantially proved, together with the subsequent transaction relative to Mr. *Oswald*'s imprisonment

Mr. *Lewis*, as a member of the house, then delivered a very elaborate argument, in vindication of the conduct of the judges; and, though, this is, in some degree, foreign to my immediate undertaking, it may not be unprofitable to those, who, either now or hereafter, wish to understand the principles of so interesting a case, to delineate the leading features of the doctrine which he maintained

He began with stating the inestimable character of true liberty, which is equally endangered by tyranny on the one hand, and by licentiousness upon the other. He said, it did not consist in the uncontrolled power of doing whatever the will might prompt an individual to attempt; but, while it was independent of arbitrary and despotic rule, it was happily regulated by the laws and constitution of the state. Having rescued Sir *William Blackstone* from the stigma of being a *courtly* writer, by shewing the enthusiasm of that author in favour of the trial by jury, Mr. *Lewis* referred to the celebrated *Commentaries* in support and illustration of his sentiments upon liberty. 1 *Black. Com.* 125 2 *Black. Com.* 4 *Black. Com.* 3. 42.

He then commented upon the origin, nature, and purposes of a state of society, which, he said, was principally formed to protect the rights of individuals: and, of those rights, he pathetically described the right of enjoying a good name, to be the most important and most precious. He observed, that the injuries which could be done to any other property, might be repaired; but reputation was not only the most valuable, but, likewise, the most delicate of human possessions. It was the most difficult to acquire; when acquired, it was the most difficult to preserve; and when lost, it was never to be regained. If, therefore, it was not as much protected, as any other right, the aged matron, and the youthful virgin, (since purity of character is the palladium of female happiness) while they are fettered by the habits and expectations of society, are exposed and abandoned by its laws and institutions. But this evil is effectually removed, when we consider the bill of rights as precluding any attempt to restrain the press, and not as authorizing insidious falsehoods and anonymous abuse The right of publication, like every other right, has its natural and necessary boundary; for, though the law allows a man the free use of his arm, or the possession of a weapon, yet it does not authorize him to plunge a dagger in the breast of an inoffensive neighbour.

Mr. *Lewis* then proceeded to consider the immediate subject of complaint. He stated it to be two-fold; 1st, That the CHIEF JUSTICE had protracted Mr. *Oswald*'s imprisonment beyond the legal expiration of his sentence; and, 2dly, That the imprisonment itself, was unconstitutional, illegal, and tyrannical.

On the *first* point, he observed, that it was, indeed, a serious charge, if Mr. *Oswald* could prove that a single justice, had arbitrarily altered, or counteracted, the record of the Court, in order to accomplish the imprisonment of a citizen. But how was the charge supported? The opinion given by the CHIEF JUSTICE to the jailer, was not given in his judicial capacity; and though a paper, said to be a

Levy, in shewing cause, contended, that the act of Assembly had departed from the practice in *England;* and that in directing a *Testatum* it referred only to the Courts of *Common Pleas*, which are limited in jurisdiction to a single county: That the same act established the jurisdiction of the *Supreme Court*, and made it co-extensive with the State; and that, therefore, as the Legislature was silent with respect to issuing a *Testatum* from this latter Court, it was fairly to be inferred, they did not mean to require it. He further insisted that the practice supported his con- 1788.

transcript from the records, was shewn to him, yet it was not subscribed by the Prothonotary, nor was it under the seal of the Court. This, therefore, could not be a sufficient document to set aside his recollection of the sentence; it was no legal evidence of the fact which it stated, (*Gilb. Law of Ev.* 23.) and the little time that elapsed between the opinion given to the jailer, and the directions for Mr *Oswald*'s release, we may fairly presume to have been consumed in examining the records.

On the *second* point, he engaged in a long and ingenious disquisition upon the nature of what is called *the liberty of the press;* he represented the shackles which had been imposed upon it during the arbitrary periods of the *English* government; and thence deduced the wisdom and propriety of the precaution, which declares in the *bill of rights*, that the press shall not be subject to restraint. He gave an historical narrative of the *British* acts of parliament and proclamations, which debarred every man of the right of publication, without a previous licence obtained from officers, established by the government to inspect and pronounce upon every literary performance; but observed, that this oppression (which was intended to keep the people in a slavish ignorance of the conduct of their rulers) expired in the year 1694, when the dawn of true freedom rose upon that nation. 9 *vol. Stat at large, p.* 190. Since that memorable period, the liberty of the press has stood on a firm and rational basis. On the one hand, it is not subject to the tyranny of previous restraints, and, on the other, it affords no sanction to ribaldry and slander;—so true it is, that to censure the *licentiousness*, is to maintain the *liberty* of the press. 4 *Black. Com.* 150. 151. 152 Here, then, is to be discerned the genuine meaning of this section in the *bill of rights*, which an opposite construction would prostitute to the most ignoble purposes. Every man may publish what he pleases; but, it is at his peril, if he publishes any thing which violates the rights of another, or interrupts the peace and order of society;—as every man may keep poisons in his closet, but who will assert that he may vend them to the public for cordials? If, indeed, this section of the bill of rights had not circumscribed the authority of the Legislature, this house, being a single branch, might in a despotic paroxism, revive all the odious restraints, which disgraced the early annals of the *British* government. Hence, arises the great fundamental advantage of the provision, which the authors of the constitution have wisely interwoven with our political system; not, it appears, to tolerate and indulge the passions and animosities of individuals, but effectually to protect the citizens from the encroachments of men in power

It has been asserted, however, that Mr. *Oswald*'s address was of a harmless texture; that it was no abuse of the right of publication, to which, as a citizen, he was entitled; and, in short, that in considering it as a contempt of the Court, the judges have acted tyrannically, illegally, and unconstitutionally. But let us divest the subject of these high-sounding epithets, and the reverse of this assertion will be evident to every candid and unprejudiced mind: For, such publications are certainly calculated to draw the administration of justice from the proper tribunals; and in their place to substitute newspaper altercations, in which the most skilful writer will generally prevail against all the merits of the case. But it is moreover the duty of the judges to protect suitors, not only from personal violence, but from insidious attempts, to undermine their claims to law and justice. Hence, Lord Chancellor *Hardwicke*, (who was an ornament to his country, and not one of whose decrees during the period of twenty years which he sat as chancellor, was ever reversed) has described three sorts of contempts—1st, Scandalizing the Court itself; 2dly,

1788. struction, and that a deviation from it would be attended with great delay and injustice: for, when the act was passed, although a *Testatum* might issue in *three* months from a Court of *Common Pleas*, it must have been suspended for *six* months in the *Supreme Court*; and thus a debtor would have it in his power to give an unfair preference to creditors in the county where he lives.

Sergeant, in reply, stated, that the *Supreme Court* has powers similar to the Courts of *King*'s *Bench* and *Common Pleas* in *England*, and that the course of practice, with respect to a *Testatum*,

Abusing parties who are concerned in causes there; and 3dly, Prejudicing mankind against persons, before the cause is heard. 2 *Atk.* 471. And in 2 *Vesey* 520, though no reflection was cast upon the Court, and the offender pleaded ignorance of the law, yet, it is expressly laid down, that ignorance was not an excuse, and that the reason for punishing was, not only for the sake of the party injured, but also for the sake of the public proceedings in the Court to hinder such advertisements, which tend to prepossess people as to those proceedings. A similar doctrine is maintained in 1 *P. Williams* 675. And 4 *Black. Com.* 282. pronounces the printing, even true, accounts of a cause depending in judgment, to be a contempt of the Court.

But it has been said, that this cause was not depending in Court, when the offence was committed, because the address was published *on the first of July*, and the writ against Mr. *Oswald* was not returnable 'till the *succeeding day*. This idea originates in an ignorance of the constitution of our Courts, which, in this respect, differs essentially from the constitution of the Courts of *England*. *There* all original process issues out of the Court of *Chancery*, and is made returnable into the *King*'s *Bench* or *Common Pleas*; so that, in truth, the writ gives the jurisdiction, and, of course, 'till it is returned, the Court cannot take cognizance of the cause. *Here*, however, the original process issues out of the very Court into which it is returnable, and is usually tested the last day of the preceding term. It is absurd, therefore, to say that the jurisdiction of a Court, by whose authority a suit is actually instituted, can be thus suspended and parcelled out.

With respect to the address itself Mr. *Lewis* analized its offensive parts, in order to shew that it treated the judges with indecent opprobrium; that, in some respects, it was inconsistent with truth, and that, in its general operation, it was intended, and could not fail, to excite resentment against *Browne*, the Plaintiff, and compassion for *Oswald*, the Defendant, in the cause.

He now proceeded to consider the *mode* of punishment, which formed a material part of Mr. *Oswald*'s complaint, and, in support of its legality, referred, generally, to the authorities which he had already cited. He observed that much declamation had been wasted upon this topic; and that the proceeding by *attachment* had been vehemently reprobated as the *creature* of the Court of *Star Chamber*. Though that Court might have employed the process of *attachment* (of which, however, he did not recollect an instance) yet, he insisted, that it was idle and absurd to consider it as the *creature* of a jurisdiction, whose own existence was of a much later date, than that of the subject to which we are told it gave birth. To prove this, he stated that the Court of *Star Chamber* was not instituted 'till the year 1368; that *Magna Charta* was confirmed, at least, 113 years before that time; and, as all the authorities concur in declaring that the process by *attachment* is as ancient as the laws themselves, and that it was confirmed by *Magna Charta*, its origin is consequently long antecedent to that of the Court of *Star Chamber*. 4 *Black. Com.* 280. 281. 282. 283. 284. 85

But he argued, with great strength and perspicuity, that the process of *attachment*, which in practice was multiplied into innumerable uses, was essential to the administration of justice; and that if the exercise of this power was suppressed, the Courts themselves might as well be annihilated. He represented, that it was an established principle in law, that one Court could not punish a *contempt* committed against another, then, continued he, how shall the *Common Pleas* repel an

had always been the same. But he contended, that unless the act of Assembly had expressly extended the power to the County Courts, they could not have proceeded by *Testatum*, to execute out of their immediate jurisdiction; which is the true reason why the Legislature takes notice of the writ in one case, and not in the other. 1788.

Upon a question from the Court, Mr. *Burd*, the Prothonotary, said that previously to the Revolution, the proceeding, in such cases, had always been by *Testatum;* though since that period a different practice had been introduced by some of the attornies, contrary to his opinion.

injury of that nature? It is not vested with any criminal jurisdiction; it cannot impannel a Grand Jury, nor try an indictment; the only remedy therefore which the case can admit, is by an *attachment*. He applied the same reasoning to the *Supreme Court;* and with respect to the *Orphan's Court*, the Court of *Admiralty*, and the Courts of the *registers of wills*, &c. he observed, that their proceedings, according to the civil law, were totally independent of juries; and that consequently if they were deprived of the process of *attachment*, it was in vain for them to decide and to decree, for they would then be without any means to enforce obedience to their decisions and decrees. Nay, he added, that, without this power, the Legislature itself would be exposed to wanton insult and interruption; and that letters, such as he had received, menacing his existence for his conduct on the present occasion, might be written and avowed with absolute impunity. He then enumerated many instances in which gross injustice would take place, but for the intervention of this summary proceeding. Where a sheriff refuses, or neglects, to return a writ; or to pay money which he has received upon an execution; where an inferior Court refuses to transmit a record; a witness, or juryman, to attend or to be sworn; and where a Defendant in *ejectment* refuses to pay costs, after a *nonsuit*, for want of a confession of lease entry and oustre;—in all these and many other cases he demonstrated, that the great, efficient remedy, was by an attachment to be issued against the delinquent.

In tracing the antiquity of the process by attachment, he remarked, that, it was admitted to be a part of the common law by the most authoritative writers; and that the common law was a compound of the *Danish*, *Saxon*, *Norman*, *Pict*, and *civil law*. 1 *Black. Com.* 63. As, therefore, the *attachment* is derived from the civil law, and the civil law was introduced into *England* by the *Romans*, early in the first century, he thought it impracticable at this day to ascertain its source; but insisted that enough appeared to prove it to be of immemorial usage, and a part of the law of the land.

He then adverted to the leading objection made by the advocates for Mr. *Oswald*, that, however the process of *attachment* might be legal in *England*, it was not so in *Pennsylvania*. From a decision in the time of Judge *Kinsey*, he shewed, that, before the revolution, an *attachment* had issued for a contempt, and that the party had, in fact, answered certain interrogatories filed by order of the Court; so that, it only remained to enquire, whether any alteration had been introduced by the constitution of the state. In the 24th *sect.* of that instrument, it is declared, that, "the *Supreme Court*, and the several Courts of *Common Pleas* of this Commonwealth, "shall, *besides the powers usually exercised by such Courts*, have the powers of a Court "of chancery, so far as relates, &c." Now, as it appears by the case which occurred while Mr. *Kinsey* was chief justice, that the power of issuing *attachments* was usually exercised by the *Supreme Court*, so far from altering the law, this is a direct confirmation of the jurisdiction of the Court; for, the greater naturally includes the less; and if the Court is vested with *all* its former powers, by what possible construction can we deprive it of this? But it is answered, that a section in the *bill of rights* provides, that "In all prosecutions for criminal offences the trial shall be by jury, &c." True; but the whole system must be taken together; or, if we examine a particular part, it must be with a recollection of the immediate subject to which that part relates. For, otherwise, this very section might as properly be

1788. BY THE COURT:—The Legislature before the Revolution prescribed no rules for the *Supreme Court;* but it is certainly vested with the powers of the *King*'s *Bench* and *Common Pleas* in *England;* and the practice has been, in general, governed by the same law. Hence, we find, that it was formerly thought necessary to proceed by *Testatum* in *Pennsylvania;* and although a contrary practice has lately obtained, it is without the opinion or sanction of the Court.

We think, therefore, that this execution must be quashed; and in every future case of the same kind, let a *Fi. Fa.* be filed in the *Supreme Court*, with a return of *nulla bona;* and then a term must intervene before the *Testatum* issues, in order to support the fiction.

The *Execution* quashed.

brought to prove, that the judges could not be *impeached* (since surely that is not a trial by jury) as that they have not the power of issuing attachmen s. All cases proper for a trial by jury, the bill of rights clearly meant to refer to that tribunal; but can any thing more explicitly demonstrate, that the framers of the constitution were aware of some cases, which required another mode of proceeding, than their declaration, that "Trials shall be by jury as *heretofore?*"—Who will assert that contempts were ever so tried? who will hazard an opinion, that it is possible so to try them?

But does not the constitution of *Pennsylvania* further distinguish between the *laws of the land*, and the *judgment of our peers;* furnishing a striking alternative, by the disjunctive particle *or?* This very sentiment, expressed in the same words, appears in the *Magna Charta* of *England;* and yet *Blackstone* unequivocally informs as, that the process of *attachment* was *confirmed* by that celebrated instrument. In the 14 *chap. of Magna Charta*, it is also said, that "no amercement shall be assessed, but "by lawful men of the vicinage;" and who, that is at all acquainted with the law, or with the reason of the law, can think it possible, in that case, to pursue the *generality* of the expression?

From these analogous principles, therefore, and the construction of ages, we may safely argue on the present occasion. But the wild and hypothetical interpretations, which some men have offered, would inevitably involve us in a labyrinth of error, and eventually endanger that liberty, which they profess, and every honest citizen must wish, to preserve.

As to the manner of proceeding upon the *attachment*, the Court on this occasion have followed the precedent in *Mosley*'s *Rep.* 250 where it is liberally said, that the Defendant shall not be permitted to be examined to bring himself into contempt; but upon proof of the contempt, he shall be allowed to purge himself upon his oath.

Upon the whole, Mr *Lewis* concluded, that the only grounds of impeachment, were bribery, corruption, gross partiality, or wilful and arbitrary oppression; and that as none of these had been proved, Mr. *Oswald*'s memorial ought to be dismissed. He said, indeed, that it would be preferable to return to the state of nature, than to live in a state of society upon the terms which that memorial presented;—terms, which left the weak and the innocent a prey to the powerful and the wicked; and which gave to falsehood and licentiousness all that was due to freedom and to truth.

When Mr. *Lewis*'s argument was closed, Mr. *Findley*, a member from *Westmoreland*, rose, and delivered his sentiments, with great ability and precision. He acknowledged, that he had received great information and pleasure, from the learned and eloquent speech of the member who preceded him; but he thought it was unnecessary, upon the present occasion, to explore the dark and distant periods of juridical history. The rights and immunities which formed the great object of the revolution, he contended, were capable of an easy and unequivocal definition; they were not of such remote antiquity as to be lost even to the feelings of the people; and the constitution of the State was the only proper criterion, by which they could

1788.

RESPUBLICA *v.* TEISCHER.

THE Defendant had been convicted in the county of *Berks* upon an indictment *for maliciously, wilfully, and wickedly killing a horse;* and upon a motion in arrest of Judgment, it came on to be argued, whether the offence, so laid, was indictable?

Sergeant, in support of the motion, contended that this was an injury of a private nature, amounting to nothing more than a trespass; and that to bring the case within the general rule of in-

be judged and ascertained. He did not, therefore, intend to pursue Mr. *Lewis* in the track of legal disquisition; but, appealing confidently to the instrument itself, he deemed it to be his duty to pronounce, that the decision of the Supreme Court was a deviation from the spirit and the letter of the frame of government. In doing this, he observed, that he did not mean to assert, that any ground had been shewn for the impeachment of the judges. But, on the contrary, he agreed with Mr *Lewis*, that bribery, corruption, or a wilful and arbitrary infraction of the law, were the only true causes for instituting a prosecution of that nature; and his candour readily induced him to believe, that as none of these had been proved, neither did any of them actually exist on this occasion. But, he said it was due to the dearest interests of posterity, that the Legislature should act with that circumspection, should decide with that wisdom, which, leading on the one hand, to an acquittal of the judges, did not tend, on the other, to establish a baneful and destructive precedent. It was in this point of view, that the present proceeding presented itself to his mind, as a matter of the greatest magnitude and importance; and he said it were better far that Mr *Oswald* had suffered in silence and obscurity, than that the attention of the Legislature should be awakened, only to give additional strength and authority to the mistaken judgment of the Court.

That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense, and understood the rules of grammar, was able to determine on a bare perusal of the bill of rights and constitution. With these aids, he defied all the sophistry of the schools, and the jargon of the law, to pervert or corrupt the explicit language of the text; and therefore he regretted, that in listening to the ingenuity of Mr *Lewis*'s paraphrase, his admiration was not necessarily followed by conviction.

He then discussed the 9 *sect.* of the bill of rights, which provides, "that in all "prosecutions for criminal offences a man hath a right to be heard by himself and "his Council, to demand the cause and nature of his accusation, to be confronted "with the witnesses, to call for evidence in his favour, and a speedy public trial, "by an impartial jury of the country, without the unanimous consent of which jury "he cannot be found guilty, nor can he be compelled to give evidence against him-"self, nor can any man be justly deprived of his liberty except by the laws of the "land or the judgment of his peers." He said, that in these expressions, there was nothing ambiguous or uncertain; they contained a recapitulation of the most valuable privileges, in the most positive language; and they did no require to be illustrated, or explained, by the *Roman* institutions, or the *British* practice. Hither, he observed, every man could safely resort, in order to be taught the nature and extent of his rights and obligations; and it would be fatal indeed to the cause of liberty, if it was once established, that the technical learning of a lawyer is necessary to comprehend the principles laid down in this great political compact between the people and their rulers. Even with respect to that clause on which the proceedings of the Judges are particularly vindicated, he did not perceive a reasonable ground for the distinction that was attempted; but thought with many other characters of superior information and abilities, that the *law of the land* was not, in fact, contradistinguished from the *judgment of his peers*, but merely a diversity in the mode of expressing the same thing. He admitted, however, that cases did exist in which it was necessary, for the sake of justice, to empower the judges to exercise a summary authority. For outrages committed in the face of the Court, for the misconduct

1788. dictments for the protection of society, it was essential that the injury should be stated to have been perpetrated *secretly*, as well as *maliciously;* which, last he said was a word of mere form, and capable of an indefinite application to every kind of mischief. To shew the leading distinction between trespasses, for which there is a private remedy, and crimes for which there is a public prosecution, he cited *Hawk. Pl. Cr.* 210. *lib.* 2. *c.* 22. *s.* 4. And he contended that the principle of several cases, in which it was determined an indictment would not lie, applied to the case before the Court. 2 *Stra.* 793. 1 *Stra.* 679.

of its officers, and for a disobedience or resistance of its process, there seemed, he said, to be a propriety in establishing an immediate remedy. But, this did not extend, in his opinion, to the case of constructive contempts; to criminal offences perpetrated out of the view of the Court: nor to such acts, as in their nature, did not call for a sudden punishment, and which, in their operation, involved a variety of facts, that a jury was only competent to investigate and determine.

With respect to the argument offered by Mr. *Lewis*, that as *attachments* had issued in *Pennsylvania* before the revolution, and as the 24 *sect.* of the constitution, declares, that the Courts shall have all the powers which they usually exercised, therefore the power of proceeding by *attachment* is confirmed. Mr *Findley* observed, that the fallacy of this interpretation would be notorious, by recollecting that the last sentence of that very section stipulates, that such powers shall not be inconsistent with the constitution. Nor would he admit the inference which had been drawn from the next section, that says, "trials shall be by jury as *heretofore*;" for, he said, it appeared by its context and immediate subject that it related to the forms and modes of proceeding upon the trial, and not to the cases in which the trial ought to be allowed.

Having expatiated, with great energy, upon the different points of the constitution, which the subject brought into view; having asserted the right of every man to publish his sentiments on public proceedings; and having urged the danger of permitting the judges, by implication, to punish for offences against themselves (observing, that if it was a contempt to write, it was also a contempt to speak of a cause depending in the Courts) he concluded with intimating, that he should take an opportunity of submitting a resolution to the house, which might serve to avert the pernicious consequences of allowing the case of Mr. *Oswald* to grow into precedent.

Mr. *Fitzsimons*, a member from the city of *Philadelphia*, now moved the following resolution.

"Resolved, That this house, having, in a committee of the whole, gone into a full examination of the charges exhibited by *Eleazer Oswald*, of arbitrary and oppressive proceedings in the justices of the Supreme Court against the said *Eleazer Oswald*, are of opinion, that the charges are unsupported by the testimony adduced, and, consequently, that there is no just cause for impeaching the said justices."

The proposition contained in this resolution, gave rise to a short but animated conversation. On the one hand, it was said, that, in admitting that there was no ground of impeachment, it was not intended to concede, that the facts represented in the memorial had not been proved: and, on the other hand, it was answered, that, if there had been proof that the memorialist, according to the complaint, "was im-"mured in prison, without even the shadow of a trial, for an imaginary offence," it would have been the indispensable duty of the Legislature to vote for an impeachment. A compromise, at length, took place, and the committee of the whole agreed to report the following resolution.

"Resolved, That the charges exhibited by Mr *Eleazer Oswald* against the justices of the Supreme Court, and the testimony given in support of them, are not a sufficient ground for impeachment."

But when this report was called up for the decision of the house, it was postponed (and consequently lost) on motion of Mr. *Clymer*, in order to introduce the resolu-

The *Attorney General* observed, in reply, that though he had not been able to discover any instance of an indictment at common law, for killing an animal, or, indeed, for any other species of malicious mischief; yet, that the reason of this was probably the early interference of the statute law to punish offences of such enormity; for, that in all the precedents, as well ancient as modern, he had found the charge laid *contra formam statuti*, except in the case of an information for killing a dog;—upon which, however, he did not mean to rely. 12 *Mod.* 337. 1788.

He said, that the law proceeded upon principle, and not merely upon precedent. In the case of *Wade* for embezzling the public money, no precedent was produced; and one *Henry Shallcross* was lately condemned in *Montgomery* county, for *maliciously* burning a barn, *(not having hay or corn in it)* though there was certainly no statute for punishing an offence of that description in *Pennsylvania*. The principle, therefore, is, that every act of a public evil example, and against good morals, is an offence indictable by the common law; and this principle affects the killing a horse, as much, at least, as the burning an empty barn.

But, he contended, that there were many private wrongs which were punishable by public prosecution: and that with respect to these a distinction had been accurately established in 2 *Burr.* 1129. where it is said, that "in such impositions or deceits where *com-*" *mon prudence* may guard persons against the suffering from them, " the offence is not indictable, but the party is left to his civil

tion originally proposed by Mr. *Fitzsimons* in the committee. Mr. *Findley* then claimed the attention of the members, and after a judicious introduction, presented the following resolutions to the chair, to supersede Mr. *Clymer*'s motion.

" Resolved, That the proceedings of the Supreme Court against Mr. *Eleazer Oswald*, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the Court, nor against any officer, or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the Supreme Court, and respecting some of the judges of said Court, was an unconstitutional exercise of judicial power, and sets an alarming precedent, of the most dangerous consequence, to the citizens of this commonwealth."

" Resolved, That it be specially recommended to the ensuing General Assembly, to define the nature and extent of contempts, and direct their punishment."

An interesting debate arose upon these resolutions, in the course of which, much that had been said in the committee was repeated, and many new ideas were suggested, upon the general question of the jurisdiction of the Court in cases of attachment. With respect to Mr. *Findley*'s propositions, that gentleman ably supported them upon the spirit of the constitution, and the expediency of the thing itself. But it seemed to be satisfactorily answered by Mr. *Lewis*, 1st That the Legislative power is confined to *making* the law, and cannot interfere in the *interpretation*; which is the natural and exclusive province of the judicial branch of the government; and 2dly, That the recommendation to the succeeding Assembly would be nugatory; for the Courts of justice derive their powers from the constitution, a source paramount to the Legislature; and, consequently, what is given to them by the former, cannot be taken from them by the latter.

Mr. *Findley*'s motions were lost by a considerable majority; and Mr. *Clymer*'s revived resolution, adopted by the house: Yeas 34. Nays 23.

1788.

" remedy for the redress of the injury that has been done him; " but where false weights and measures are used, or false tokens " produced, or such methods taken to cheat and deceive, *as people* " *cannot by any ordinary care or prudence be guarded against*, there " it is an offence indictable."—Accordingly in *Crown Circ. Comp.* 231. 1 *Stra.* 595. *S. C. Crown Circ. Comp.* 24. are cases of private wrongs, and yet punished by indictment; because, as it is said in *Burrow*, common prudence could not have guarded the persons against the injury and inconveniency, which they respectively sustained. The same reason must have prevailed in an indictment at *Lancaster* (the draft of which remains in the precedent book of the successive *Attorney General* of this State) for poisoning bread, and giving it to some chickens; and it applies in full force to the case before the Court.

Independent, however, of these authorities and principles, the Jury have found the killing to be something more than a trespass; and that it was done *maliciously* forms the *gist* of the indictment; which must be proved by the prosecutor, and might have been controverted and denied by the Defendant. Being therefore charged, and found by the verdict, it was more than form; it was matter of substance.

The opinion of the Court was delivered on the 15th of *July*, by the CHIEF JUSTICE.

M'KEAN, *Chief Justice*. The Defendant was indicted for " maliciously, wilfully, and wickedly killing a horse," and being convicted by the Jury, it has been urged, in arrest of judgment, that this offence was not of an indictable nature.

It is true, that on the examination of the cases we have not found the line accurately drawn; but, it seems to be agreed, that whatever amounts to a *public wrong* may be made the subject of an indictment. The poisoning of chickens; cheating with false dice; fraudulently tearing a promissory note, and many other offences of a similar description, have heretofore been indicted in *Pennsylvania;* and 12 *Mod.* 337. furnishes the case of an indictment for killing a dog;—an animal of far less value than a horse. Breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot; and the embezzlement of public monies, have, likewise, in this State been deemed *public wrongs*, for which the private sufferer was not alone entitled to redress; and unless, indeed, an indictment would lie, there are some very heinous offences, which might be perpetrated with absolute impunity; since the rules of evidence, in a civil suit, exclude the testimony of the party injured, though the nature of the transaction generally makes it impossible to produce any other proof.

For these reasons, therefore, and for many others which it is unnecessary to recapitulate, as we entertain no doubt upon the subject, we think, the indictment will lie.

Let judgment be entered for the *Commonwealth*.*

* See *ant.* 41. *Resp.* v. *Sweer*, 2 *Dall. Rep.* 299. *in not.*

1788.

JAMES v. BROWNE.

THIS was an action of *Account render*, brought by one partner against another, and several issues were joined on the pleas, 1st of *Ne unques Receiver*, and 2d *Fully accounted*. In the declaration the Plaintiff and Defendant were named *Merchants*, and the Defendant was charged as a *Receiver* of monies to the joint benefit of the company from *three* persons, and the proof was of a receipt from *one* of them.

For the *Defendant*, it was contended, that as he had not been charged as *Bailiff*, in order to make him accountable as *Receiver*, it was incumbent upon the Plaintiff to state in his declaration, by whose hands the monies were received, and to prove, accordingly, a receipt by the hands of such person, or persons, *Bull L. N. P.* 121. That unless the proof went to all the persons stated in the declaration, he failed in his action; or, at least, that the verdict must be conformable to the evidence, which was only of a receipt by the hands of *one*, so that the judgment *quod computet*, pursuing the verdict, must be restricted to that receipt alone.

But it was answered, and so ruled BY THE COURT in their charge to the Jury, that, however the law stood in the case of a *Common Receiver*, yet, as between *Co-partners*, the action of *account render* would be nugatory, if the same doctrine prevailed. That in *Pennsylvania* particularly, where there is no Court of Chancery to compel a disclosure of the numerous and extensive transactions, which one partner might manage for the joint benefit of the company, there would be no remedy, unless this action were liberally extended. That between partners, therefore, it is sufficient for the Plaintiff to charge the Defendant, generally, with the receipt of the money to their joint benefit; and having proved a receipt by the hands of any one of the persons mentioned in the declaration, he is entitled to a general verdict upon the *first* issue. Then, on the judgment *quod computet*, all the accounts between the parties will come before the auditors, without particular respect to the receipts proved upon the trial.

No evidence being offered by the Defendant, in support of the *second* plea, the Jury gave general verdicts for the Plaintiff upon both issues; and thereupon judgment *quod computet* was entered.

Afterwards, when the Court were about to appoint auditors in this cause, the CHIEF JUSTICE made the following observations:

M'KEAN, *Chief Justice*. The necessity of a liberal extension of the action of *account render* between joint partners, is apparent, not only from the nature of the case, but from this circumstance also, that the parties would otherwise be destitute of any means to arrive at justice: For the action on the case, though beneficially construed in modern practice, would certainly be inadequate; and we have no Court of Chancery to interpose an equitable jurisdiction. The action of account has, we know, been almost

1788. disused in *England* for a century past; but this is owing to the greater facility of obtaining settlements in the Court of Chancery, by a reference to the masters; and there are many cases in the books which point out the expediency and propriety of the interference of that Court. If, indeed, it had not assumed a competent jurisdiction in this respect, I am persuaded, that, in order to accomplish justice, the Court of *King's Bench* would have done what we are now obliged to do. For, it is the duty of Judges to see the laws faithfully administered, and to promote the proper means for obtaining that end.

Hence it is, that *here*, in an action of *account render* between partners, if these facts are proved—that a partnership existed—that the Defendant was the acting partner—and that he received any part of the sum, from any of the persons mentioned in the declaration—we shall uniformly oblige him to render an account of his transactions. It would be hard, indeed, if, while the books and documents remain in the hands of the Defendant, the Plaintiff were bound to state in his declaration every receipt in which he was interested, and to be condemned to lose, under such circumstances, his portion of every credit he omitted to insert, in the course of a mercantile transaction, consisting, perhaps, of ten thousand items.

It should be observed, likewise, that there is a distinction in the general law as to Bailiffs and Receivers; the former being entitled to reasonable expences, which the latter cannot recover. This distinction, however, does not apply to the case of partners in trade; for, one partner, though charged as a receiver, is entitled to every just allowance against the other.

Nor does the verdict of the Jury affect the principles of the settlement; for, suppose I engage in trade with another man, and pay into his hands a £. 1000, as my share of the stock; if, afterwards, I bring an action of *account render* against him, and the Jury find the receipt of this money;—such finding does not surely fix the sum for which he shall be responsible to me, but the auditors will, nevertheless, on the one hand, allow me a proportion of any profits which have been accumulated; or, on the other hand, charge me with a proportion of any losses or expences that may have happened in our joint negotiations. *Co. Lit.* 172. *a*—*sec.* 259.

BUTCHER *v.* COATS.

TWO witnesses, who had been duly served with a *Subpœna*, were brought before the Court upon an attachment; but having satisfactorily proved, that they were so much indisposed, as to be utterly incapable of attending in obedience to the *Subpœna*, they were discharged.

And, BY THE COURT: As we do not find these persons in contempt, the costs of the attachment must abide the event of the suit.

Common Pleas,

PHILADELPHIA COUNTY.

September Term, 1788.

MURDOCH *v.* WILL.

THIS was an action against the late Sheriff for taking insufficient sureties on a replevin bond; and the PRESIDENT, in his charge to the Jury, laid down the following positions.

1. That, as the law gives the remedy of a distress to a landlord, it is incumbent upon the Sheriff to see that the security is good, before he returns the property on a replevin.

2. That evidence of a vague report of the surety's being in good circumstances is not sufficient to repel the proof made by the Plaintiff, that his circumstances were bad at the time of the replevin.

3. That the value of the distress, at the time of the replevin, and not the amount of the rent due, is the proper measure of damages in this action.

4. That, therefore, the goods distrained ought (although a contrary practice has prevailed) to be valued before they are delivered on a replevin.

Verdict for the Plaintiff for the value of the goods distrained.

INGLES *v.* BRINGHURST.

INDEBITATUS Assumpsit for money laid out and expended, &c. The case was this.—The Plaintiff, *Ingles*, had a house in the district of *Southwark*, against the wall of which one *Waters* had erected another house. *Waters* becoming insolvent, his

1788. house, on the 1st of *August*, 1774, was sold under a *Venditioni Exponas* to one *Ridley*; but he, also, falling into distress, the house, by virtue of a similar process against him, was again sold, on the 7th of *March*, 1776, to the Defendant, *Bringhurst*, for a full and valuable consideration. In the advertisements published on the occasion of these successive sales, no other incumbrance was mentioned, than a ground-rent of £. 6; and the Defendant had remained in quiet possession of the premises until about two or three years ago, when the Plaintiff demanded of him one half of the cost of the party wall between the above mentioned houses; and, the demand being refused, he brought this action to recover the amount.

The question, therefore, agitated on the trial, was, whether the claim for a reimbursement of a moiety of the cost of a party wall, under the act of Assembly, (see 1 *State Laws* 293.) was a lien upon the land, or only a personal charge against the builder of the second house?

The Plaintiff called several witnesses (who had been regulators of considerable experience) in hopes of establishing a custom favourable to his pretensions. They only proved, however, that the valuation of a party wall was never made until the second house was built; and that, even afterwards, it was frequently postponed for four or five years. One of the witnesses, indeed, said, that he remembered an instance where the purchaser paid the moiety of the cost of the party wall, and not the original builder of the second house; but he could not ascertain whether this was the effect of any agreement of the parties, or not.

The argument was conducted by *Levy* for the Plaintiff, and by *Tilghman* and *Hallowell* for the Defendant.

For the Plaintiff, it was urged, that, in a variety of cases, the law favoured and supported a usage in particular matters, even before it had attained all the characteristic qualities of a custom. Thus, the general rule of law entitles a lessee *pur auter vie* to emblements, but not a tenant for years; and yet, on the usage of a particular place, it was determined, that where there was a lease for one year from the 25th of *March*, the lessee might (after the expiration of the term on the succeeding 25th of *March*) enter at the *October* harvest, upon the arable lands, and remove the crop, notwithstanding the positive limitation of his contract. *Doug.* 361. A warrant of attorney to confess a judgment is, by the course of the Court (which is the law of the Court) made irrevocable; and yet it is the nature of all letters of attorney to be revocable. *Farrest.* 95. In *Pennsylvania*, likewise, several striking precedents have been established upon this point. On proof that it was a usage among *tanners* to work in and out for three vatches, it was lately decided in this Court, that, for that purpose, the lessee of a *tan-yard* was entitled to hold over the possession, although his agreement was for a fixed and determinate time. So in the case of a *Feme Couvert*, who could not at common law convey her maiden lands but by *fine*, yet, as it had been the constant usage of the province to make such

conveyances by deeds of bargain and sale, the usage was recog- 1788.
nized by the Court, and the deeds adjudged to be obligatory. *Lloyd*'s *Lessee* v. *Taylor*, *ant.* 17.—In the case at bar, it is proved to have been the general usage, not to value the party wall till the second house is built; and, even then, it is frequently delayed for several years; so that it must necessarily be inferred, that the usage extends to make the purchaser of the second house, as liable as the person who built it, for the moiety of the partition; of which indeed, all the positive evidence has been given, that the nature of the case affords.

For the Defendant two points were made.—1st. That the action could not be maintained at *common law*. And 2d. That it was not authorized by the act of Assembly.

1. On the *first* point, it was observed, that *bona fide* purchasers for a valuable consideration are highly favoured in law; 2 *Black. Com.* 247. and of these, purchasers under an execution are the most esteemed; insomuch that if the execution is afterwards set aside for irregularity, they shall nevertheless hold the lands. 2 *Bac. Abr.* 370. 1 *State Laws* 52. Pursuing this regard for honest purchasers, if a trustee sells trusts lands for a valuable consideration, without giving notice of the trust, the law declares that the buyer shall hold the lands discharged. *Cas. Temp. Talb.* 260. and even if a man purchases for a valuable consideration with notice of a settlement, from one who who bought without notice, he shall shelter himself under the first purchaser. 1 *Atk.* 571. The Defendant is a *bona fide* purchaser under an execution, for a valuable consideration, without notice of the Plaintiff's demand: He is, therefore, in all respects, within the benefit of these authorities, and ought not to be made responsible for the negligence of the Plaintiff, who had it in his power to recover from the original owner of the house, who knew of the sales, who never gave notice of his claim at the times of sale, and who has suffered so long a period to elapse before he made a demand, as to justify a presumption, that, whatever was due, has been paid. *Cowp.* 109. If, indeed, a man will stand by at the time of sale, and not disclose his lien, the law deems him guilty of a fraud, and postpones his right to that of the purchaser. 2 *Atk.* 85. *Gilb. Eq. Rep.* 85. 1 *Ves.* 94. In the present case particularly, it would be highly dangerous, if the rule were otherwise; for, there is no record, as in the cases of mortgages and judgments, to which a man can refer in order to ascertain the incumbrances that will thus affect his purchase; nor is there any means by which a remote purchaser can shew that the lien has been discharged by his predecessors.

It is evident, then, that a lien of this kind can only be created by the operation of law, or the act of the parties. It is not pretended that the Defendant is liable from his own act; for, he neither built the house, nor assumed to pay the money; and, when the Plaintiff would avail himself of a usage, it is incumbent upon him to make strict proof of its existence; which he has fail-

1788. ed in doing upon this occasion,—whatever might be the effect of the testimony, as between *Ingles* and *Waters*, the original builders of the houses, to whom alone it has any relation.

2. Nor, on the *second* point, is the action authorized by the act of Assembly. The words relating to this controversy are, that "the first builder shall be reimbursed one moiety of the "charge of the party wall, or for so much as the next builder "shall have occasion to make use of, *before he shall in any wise use or break into the said wall*, &c."—Here then is the remedy which by operation of law is given to the first builder; and when a statute gives a new remedy the party must take it on the terms of the act, 2 *Burr. Fitzg.* 47. 3 *Lev.* 48. *Fitz.* 85. 1 *Vent.* 104. *Stra.* The Plaintiff was empowered to compel a reimbursement of the moiety of his expences *before Waters could use the wall;* and if he has neglected to do so, although it would perhaps be unjust in *Waters* himself to refuse the payment, yet there is no legal or moral obligation that can bind a subsequent purchaser; for, on the spirit and words of the act, he had a right to presume that the claim was already satisfied; or, if he had known that it was not, he might have insisted on some abatement in the price. The first builder, indeed, could have no greater lien than the carpenter, or mason, who built the house. In *England*, where real estate is not liable for the payment of single contract debts, if a house descends to the heir he is not bound to pay the carpenter that repaired it, who can only resort to the personal estate for satisfaction. 1 *Ves.* 155. So here; as the Plaintiff allowed the second builder to use the party wall *before* he exacted the contribution which the law allows; it became a matter of mere personal confidence; and, however the person of *Waters* might be liable, his house and lot were effectually discharged.

For the Plaintiff, in reply. As the Defendant has not relied on the statute of limitations in his plea, no argument from the lapse of time can apply. Nor is it any reason that the Plaintiff should lose his claim, because the Sheriff omitted, or neglected, to make it known at the time of sale? and there is no ground to presume (nor ought fraud ever to be presumed, 2 *Atk.* 83.) that the Plaintiff knew when the sale was. Incumbrances in law or equity are not altered or affected by a Sheriff's sale. The Sheriff has no authority to bind a stranger to the process under which he sells: and this distinguishes the case from that of the trustee, whose acts are binding upon the *cestuy que trust*. It is clear that a mortgage shall divest the title of a purchaser, though the mortgage was not mentioned at the sale; for, the Sheriff only sells the right which the Defendant had in the premises. The Defendant ought to have enquired whether the Plaintiff's claim was satisfied; and the law does not help those who sleep, but only those who are active and vigilant.

The right given by the act of Assembly *to be paid before* is a new and extraordinary one; for, the common law admits of no compensation until value received. There is not any remedy, however, pointed out for the recovery of this new right; and it

will hardly be pretended that an action would lie before the second house was begun; until which time it is impossible to say how much of the wall is wanted, nor, consequently, how much contribution is due. But the Plaintiff does not insist on this new right; he does not ask for payment before, but long after his wall has been used; and surely, the Legislature that gave a right in the former case, must have admitted a much stronger right to recover in the latter; for, he who uses another's property is liable, at all times, to pay for it. This, indeed, is a principle of natural justice paramount to all acts of Assembly; and, as every continuance of a nuisance is as culpable as the original offence, the Defendant's continuing to occupy and use the Plaintiff's wall, is, in itself, sufficient to make him liable to the present demand. 1788.

Shippen, *President.* The principal point in this case is, whether under our act of Assembly, the moiety of the cost of a party wall, is a personal charge against the builder of the second house, or such a lien upon the house itself, as shall render it liable to the reimbursement of the first builder, into whose hands soever it may come?

Lien is a technical term, that means a charge upon lands, running with them, and incumbering them in every change of ownership; as mortgages, judgments, ground rents, &c. There are some liens, also, created by statute; as, in the very act in question, where a perpetual lien is clearly given to the first builder of a party wall, for so much of his neighbour's land, as one half of the breadth of the wall shall cover. It is enacted, at the same time, that the second builder, having the use of one half of the wall, shall reimburse one half of the expence of building it; which is a reasonable and useful regulation, calculated to prevent animosities and disputes.

Whether, however, a purchaser of the second house, after it is built, shall be liable to the claim of the first builder, who has neglected, or declined, to insist upon the payment, before his wall was broken into, has been made a question, but, I think, it is easily resolved by attending to the expression and manifest intent of the law.

The act of Assembly declares that the first builder shall be reimbursed; but it also prescribes the time of reimbursement to be, *before the second builder shall in any wise use, or break into the wall.* This, it has been observed, is an indefinite right of payment; for, until the second house is begun, it cannot always be ascertained how much of the wall will be wanted, nor, until then, is there any form of action in which a recovery can be had. But this argument may, at once, be obviated by considering, that if a man makes a breach in my wall, he is a trespasser, and, generally speaking, I have a competent remedy for the injury which he has done. The act of Assembly, however provides, that any person whose lot joins upon my house, may lawfully use and break

1788. into the wall, if he has first paid me a moiety of the cost of building it. Now, although no action will lie to recover this moiety until the second house is actually begun, yet, if it is begun and a breach made in the wall before the payment, the builder is considered as a trespasser, notwithstanding half of the wall is raised upon his ground; and in an action of trespass against him, he could not justify under this act. Or, perhaps, the Plaintiff might wave the trespass and bring an action on the implied assumption for money paid for the Defendant's use.

The difficulty, indeed, of ascertaining how much the first builder is entitled to receive, until the second house is erected, has given rise to the usage that has been proved; but this extends no further than to shew, that the valuation of the party wall is never made before the second house is built, and, often, not until several years afterwards. The usage, to this effect, may have a reasonable foundation; but to reach the present case the evidence of a usage, if at all admissible, ought to have shewn, that, for a long series of years, the owner of the second house, however remote from the builder, was held liable to pay the moiety of the charge of the party wall. This has not, I think, been satisfactorily done.

The Plaintiff then contends for his claim upon another principle, that, as the Defendant has the use and occupation of the wall, he ought to be proportionally liable for the cost of building it; and this would certainly be a strong argument, if a lien actually existed. But, if the moiety of a party wall is only a personal charge against the second builder, there is no more reason that a subsequent purchaser should be responsible for that, than for the payment of the brickmaker or mason. Considering it, therefore, as a lien, it will bind the estate, like a mortgage or judgment; but, considering it as a personal charge, the Plaintiff, upon an implied contract (as well as the tradesmen who were employed, upon an express one) must resort to *Waters* for payment and satisfaction of his demand.

This, therefore, brings it to the original question, whether, in this case, a lien exists or not? And THE COURT are clearly of opinion that it does not. Why, indeed, should the Legislature have directed the payment to be made *before* the breach, if they meant that the second house should be for ever charged with the cost of the party wall, whoever might be the owner? in almost every instance of a lien there is some record by which it is announced to the public, and to which every man may have access. But here, it is a dormant transaction; the claim is not known when the sale takes place, so that the purchaser loses the opportunity of indemnifying himself; and, even if it had been satisfied by the first builder, or the intermediate purchaser, that is a fact which it cannot be in the Defendant's power at this time to establish.

Verdict for the Defendant.

1788.

M'KEGG *v.* CRAWFORD.

IN this cause there was a rule to try next term, or *non pros*; the term being elapsed, *Levy*, at the settlement of the docket, signed the *non pros* in the *Prothonotary*'s office; and now *Armstrong* moved to set it aside.

SHIPPEN, *President*:—This is not like a rule to plead, or declare; for, a trial is a thing that must be in the face of the country. A *non pros* of this kind ought, therefore, to be moved for in Court, when the Plaintiff may assign reasons for the delay of trial.

THE COURT seemed satisfied that the *non pros* ought to be set aside, but at the request of *Levy*, who thought he could produce some authorities on the subject, they only granted a rule to shew cause, &c. The rule, however, was afterwards made absolute.

GEYER *v.* SMITH.

THE referees appointed in this cause, applied to the Court for instructions on a point of law, in order to guide them in making their report.

But, BY THE COURT:—The referees must first exercise their judgment upon the lights they have received; and the question, being afterwards brought regularly before us, we will determine, whether they have acted right or not. It would not only be an inconvenient practice, but, in a great degree destructive of the principle and uses of a reference, if such applications were to be complied with; and, therefore, we think it is proper to avoid establishing a precedent.*

* Afterwards, in *June* term 1789, the point of law was argued on the report of the referees. The action was brought against the Defendant as administrator of *Robert Smith* on a bond taken by *Geyer* from the administrator for the intestate's debt, naming himself administrator. The question was, whether the Plaintiff, on the judgment against the administrator on this bond, could take the estate of the intestate in execution?

It was argued by *Sergeant*, *Fisher*, and *Wilson*, that he could not; it being the proper debt of the Defendant himself, and they cited several authorities.

Ingersol, on the part of the Plaintiff, said, that on considering the law, he had no encouragement to argue it.

SHIPPEN, *President*. The case having been broke at the last Court, I have looked into the point, and find other cases than those cited at the bar, which shew, that a creditor taking a bond from the executor or administrator, discharges the old debt; that the calling himself executor, or administrator, in the bond, is surplusage, and that he is chargeable only in his own right. 1 *Mod.* 225. 10 *Mod.* 254. *Cro. El.* 406. 9 *Co.* 93. *Vin. Ex.* 304.

1788.

PENMAN *et al.* v. WAYNE.

THIS cause came again before the Court, in consequence of the former decision, that, on the rule to shew cause why the writ should not be quashed, "the Defendant may controvert the fact of his not being *resident* in the State for two years next before the writ issued," which was stated in the deposition filed on the part of the Plaintiff, in order to ground a *Capias* against him, notwithstanding his being a freeholder. See *ant.* 241.

Sergeant now produced an additional affidavit, setting forth, that the Defendant had left this State, and resided in *Georgia* (where he had a considerable property) for upwards of fifteen months, next before the writ issued.

In opposition to which *Lewis* examined a witness, who proved that the Defendant had a real estate in *Chester* county, whereon his wife and several children constantly resided; that he had expressed an intention of selling his property in *Georgia*; that he never meant permanently to reside there, but went thither upon particular business; and that as soon as that was transacted he designed to return to his estate and family in *Pennsylvania*.

THE COURT were unanimously and clearly of opinion, that, upon these circumstances, the Defendant ought to be considered as a resident of the State of *Pennsylvania*, and was entitled to his privilege as a freeholder.

Whereupon the rule to shew cause why the writ should not be quashed, was made absolute.

BARNARD v. FIELD.

RULE to shew cause why the *Capias* issued in this case should not be quashed, the Defendant being a freeholder. As the Plaintiff had delayed issuing process until within three or four days of the term, he could not issue a summons, (which, must be, at least, ten days before the return) but he had directed the Sheriff to accept the Defendant's appearance, by an indorsement on the *Capias*.

Heatly, in shewing cause against the rule, observed, that the words of the act were, that a freeholder should not be arrested or detained; that in the mode here adopted, there had been no detention; and that it was sanctioned by an uniform practice in similar cases.

Todd insisted, for the Defendant, that in no case, upon no terms, shall a *Capias* issue against a freeholder, unless he is brought within the exceptions of the act.

SHIPPEN, *President*. The act of Assembly expressly directs that the process, to be issued against a freeholder, shall be a *Summons*. Upon the writ which has issued in this case, the Defendant must be arrested before his appearance can be accepted; and it might hereafter be doubted, under our act of Assembly, whether in submitting, even upon those terms, to the *Capias*, he has not forfeited his privilege to be sued by a *Summons*. 1788.

The rule made absolute.

ABBOT *v.* PINCHIN.

THERE was a rule of reference in this cause, the report to be made to *next term*. After the next term, however, the referees, who had never met on the business, were changed by consent, and the report made returnable *into office*: Whereupon it was said by SHIPPEN, *President*, that the rule for reporting to the *next term*, was expired by its own limitation, and the case, in that respect, open to any new agreement of the parties.

RAPELIE et al. *v.* EMORY.

ON the trial of his cause, it was ruled by SHIPPEN, *President*, that where one man has received money belonging to another, and has retained it without the consent of the owner, it is to be considered in the same light as money lent, and ought to carry interest. He said that this case was clearly distinguishable from that of goods sold and delivered, where no money actually passes between the parties, and interest is not due of course.*

OXLEY *v.* COWPERTHWAITE, Sheriff.

THIS was an action against the Sheriff for taking insufficient sureties on a replevin bond; and the question materially discussed on the trial, was, whether a Sheriff is responsible that the sureties shall prove sufficient on the event of the replevin; or only that they were of good credit at the time of their entering into the bond?

* See *ant.* 265. *Henry*, ex'or. v *Risk et al. ant.* 315. *Williams* v. *Craig*. In the case of *Crawford et al.* v. *Willing et al. S. C.* Dec. T. 1803, the question of interest was fully discussed; and the following points ruled in the charge to the Jury, viz. 1*st* That the practice of abating in interest, during the Revolutionary war, could not be applied to neutrals. 2*d*. That a dormant partner was liable for interest, upon the receipt of the money, and the correspondence of an acting partner, without his privity or participation. 3*d*. That a factor, or agent, who does not, with due diligence remit the money of his principal, is chargeable with interest. 4*th*. That law, equity, and good conscience, concur in making every man pay interest, who retains the money of another, without permission, and, a *fortiori*, if it is retained contrary to his duty as an agent.

The authorities cited in this case, were; 1*st*. For the Plaintiff, by *E. Tilghman* and *Ingersoll*. 1 *Dall. Rep.* 349 1 *Vez jun.* 63. 300 *Ridgeway* 286. 1 *Vez.* 310. 1 *Wils.* 682. *Vez.* 77. *4th.* 80.—3*d*. For the the Defendant, by *Lewis*. *Durdin* v. *Gaskell*, S. C. 1797, (where, though interest was due for 37 years, on money recovered in trust, and concealed from the Plaintiff, only a few years interest had been allowed) 1 *Wils* 376. 3 *Wils* 205. 1 *Dall. Rep.* 349. *Doug.* 361. 1 *Dall. Rep* 265. 3 *Dall.* 313 3 *Bac. Abr.* 517. 2 *Vent.* 151. *Doug* 629 *Cowp* 215. 1 *Will.* 742. *Atk* 493. *Gilb. Eq.* 224. *Durden* v. *Gaskell*, where Defendant did not know to whom the money belonged.

1788. *Sergeant*, for the Plaintiff, observed, that the Defendant in replevin could not control the Sheriff in accepting or rejecting the sureties, and, therefore, he ought not, in justice, to be affected by their eventual insolvency; and, he insisted, that, in law, the Sheriff takes them at his peril, and is answerable for their *proving* sufficient. *Gilb. on Dist.* 67. 176. 1 *Bac. Abr.* 207.

Levy, for the Defendant, stated the history, nature, and duties of the Sheriff's office from *Robinson*'s *Charles the fifth*, 1 *Vol. p.* 213. and contended, that if a Sheriff discharged his duty *bona fide*, and with reasonable diligence, he was not responsible for consequences which no human foresight could penetrate or prevent.

350

SHIPPEN, *President*.—The only point for decision is, whether the Sheriff is responsible for the sufficiency of the sureties at the time of taking the bond; or at the end of the suit, when the landlord has established his right to the rent for which the goods were distrained?

The case of a bail-bond differs, I think, in one respect, at least, from a replevin bond; for the sufficiency of the former may speedily be enquired into, but the latter must wait the event of the replevin, which may be suspended for several years, until, perhaps, by the vicissitudes of trade and fortune, the sureties have become insolvent. This, therefore, is certainly a hard part of the Shereff's duty. But there is likewise, a hardship in the case of the landlord; for, by the replevin he is divested of the immediate security of his tenant's goods, and yet has no right to interfere in the choice of the sureties, that undertake to see them returned when he has established his demand.

From this view, then, it certainly seems reasonable, that he, who is exclusively authorized to take and judge of the security, should rather be affected by its eventual insufficiency, than he who has no right to question its validity. The authorities, indeed, are positive, that, if the sureties do not *prove sufficient*, the Sheriff is liable; and, although the case must frequently have happened, no contrary decision can be produced; for in *Murdock* v. *Will*, (see *ant.* 341,) and *Welsh* v. *Procter*, both lately tried here, the Council put the cases upon the point of insufficiency of the sureties at the time of taking them; so that the present point never came in question.

That the policy of the law in this respect bears hard upon the Sheriff, may be a reason with the Legislature to make some new provision for an enquiry into the sufficiency of the bail in an earlier stage of the cause; but cannot be a justification for our deciding, at this time, contrary to an established principle.

THE COURT are, therefore, clearly of opinion, that the verdict, on the question of law, ought to be in favour of the Plaintiff.

And, accordingly, the Jury gave the Plaintiff damages to the value of the goods at the time they were distrained.*

* See *Murdock* v. *Will*, ant. 341.

Supreme Court of Pennsylvania:

September Term, 1788.

WALTON *v.* WILLIS.

THIS was an appeal from the *Orphan's Court* of the county of *Philadelphia*. It was argued in *January* term by *Levy* and *Tilghman* for the Appellant; and *Sergeant* and *Ingersol* for the Appellee. And now the CHIEF JUSTICE stated the case, and delivered the opinion of the Court, in the following manner.

M'KEAN, *Chief Justice*. *Elizabeth Willis* being seized of a messuage and lot of land in the city of *Philadelphia*, with the appurtenances, died intestate, leaving issue a daughter named *Elizabeth*, who had intermarried with *Samuel Walton*, the Appellant, and by him had issue two sons, *Joseph*, and *Booz*; and four grandchildren, to wit, *Thomas* the Respondent, *Solomon*, *Musgrove*, and *Rebecca*, being the children of her son *Solomon Willis*, deceased, who had died, before her, intestate. The daughter, *Elizabeth Walton*, died after her mother, and her husband, the Appellant, and their two children, before named, survived her. *Thomas Willis*, the Respondent, applied by petition to the *Orphan's Court* of the county of *Philadelphia*, held on the 1st of *April*, 1782, for a partition of the premises; or, if they could not be divided without prejudice to, or spoiling the whole estate, that a valuation thereof might be made, agreeably to the directions of the acts of Assembly in such case made and provided. An inquest was accordingly had, and a return made, that the premises could not be divided without prejudice to, or spoiling the whole, and valuing the same at £. 358. This return was confirmed by the Court on the 10th of *June*, 1782, and the premises were adjudged to, and accepted by *Thomas Willis*, the Respondent, at the above valuation; and for securing the payment of that sum, in due proportions to the other *grand-children*, he offered to the Court two sureties, who were approved of, and directed to give bonds in the

1788. office of the Clerk of the Court, unto the other grand-children, for their respective shares; *but no such bonds or security have yet been given.*

On these proceedings an appeal is brought before this Court; and, upon the argument, the Council have done great justice to their respective clients. It was our wish, however, that the opinions and practice of the several *Orphan's Courts* of *Pennsylvania*, had been ascertained in cases of this description; and that we might be informed, whether any cases, upon similar principles, had been ever determined in the *Supreme Court;* for we should be exceedingly cautious in pronouncing a judgment that might shake estates held in this way. As we have not yet obtained full satisfaction on this head, we would still wish to defer giving our opinion; but that we think it proper, from the length of time the cause has been under advisement, to proceed upon the lights we have received.

On the part of the Appellant, six exceptions have been taken to the proceedings in the *Orphan's Court.*

1. That it is no where mentioned, who are the representatives of *Elizabeth Willis*, the intestate; nor into how many parts the estate should be divided; but the whole is left to the Sheriff.

2. That the Court have adjudged the estate to a *grandson;* whereas they had no authority to go beyond the first degree in the descending line.

3. That even if the acts of Assembly did impower the Court to go farther, to wit, to the grand-children, yet that the adjudication ought to have been to all the children of the eldest son, and not to his eldest son exclusively.

4. That no provision is made for the Appellant, *Samuel Walton*, who is tenant by the courtesy of his wife's share, to wit, of a third part, in three parts to be divided.

5. That the judgment is uncertain with respect to the valuation money; in as much as the amount of each share is not particularized, nor the time of payment limited.

6. That the partition ought to have been made by one inquest, if practicable; but, if not practicable, and so returned, the valuation ought to have been made by another inquest; and that, on the whole, no estate can be vested in *Thomas Willis* by his acceptance at the valuation, as no security has yet been given for the money.

The weight of these exceptions depends upon the due construction of the act of Assembly, entitled, "An act for the better settling of intestates estates," the supplement to that act, and the practice under both of them.

1. With respect to the *first* exception; we think it would be well for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and of the purparty of each; and in this respect to pursue the form of a declaration in partition, and of the return of a writ *de partitione facienda.* But to reverse an inquest for this omission, would cer-

tainly affect many estates, as these proceedings in the *Orphan's Courts* are frequently drawn by persons not much skilled in strict forms; and, in the present case, as the return of the Sheriff has been, that the estate could not be divided without prejudice to or spoiling the whole, no wrong or damage seems to have been done to any one. For these reasons we must overrule this objection. 1788.

2. The *second* exception introduces a question, whether a *grand-son*, that is, the eldest son of the eldest son of an intestate, is entitled to an estate, which cannot be divided, at the valuation, in the same manner as his *father?* and this must be decided by the words, purview, and the intent of the Legislature, in the two acts of Assembly which have been already cited. The *main intent* of these acts appears to have been, that real estates should be divided among the children, or representatives in the descending line of an intestate; and not descend to the heir at the common law. But a *secondary, and the next intent*, seems to have been, to prevent estates from being split and frittered into many parts, to their manifest prejudice; and, accordingly, it is provided, that where that would happen, the eldest son or heir at law, should have his election of taking the land at a valuation, to be made in the manner prescribed in the acts.

The *reason* of a law will have great influence in determining its *extent;* and on the present occasion, the reason alluded to, is much stronger in the case of *grandson* than of a *son;* for, in this case, the distributive shares will probably be most numerous, and, consequently, most injurious to the land by a division or partition. The words "heir at law," in both acts, are, in strict grammatical construction, an expression, or substitute for *eldest son;* but the reason of the law, and the usage ever since the passing those acts of Assembly (as we have been informed) will warrant a more extensive and beneficial intepretation of them. We think, therefore, that this objection likewise fails, as well as

3. The *third* objection, which we overrule; *Thomas* being alone the heir at common law.

4. But the *fourth* exception appears to the Court to be *fatal.* There ought to have been a provision made for *Samuel Walton*, who had an estate for life by the courtesy, and yet he is not even *named* in the *sentence or decree* of the Court below. When a writ *de partitione faciendo* is issued, the Sheriff is obliged to *summon* all the parties to attend; and, if they do attend, he must make the partition in their *presence.* The same thing is not, indeed, *expressly* required in the partition, or valuation, to be made under the acts of Assembly; yet natural justice, and the constant rules of all Courts require, that every person, who is interested in the proceedings, should be *summoned and heard.* 3 *Mod.* 378. It may not, perhaps, be the practice, nor is it necessary in this case, that it should be *set out in the return by the inquest*, though we would wish that to be done; but it is essential to justice that all parties should *in fact* have notice. On the proceedings before the Orphan's Court, the Appellant has not been made even a *party*

1788. in the decree; and the presumption of course is, that he was neither *summoned nor present*. If he had been present, he might possibly have urged such arguments, as would have induced the inquest to have put a higher estimate, or value, upon the premises, and an opportunity ought to have been given to him for that purpose.

5. As to the *fifth* exception; there does not appear to be sufficient certainty in the sentence of the Court; inasmuch as the purparts of the valuation money are not specified, nor the time of payment fixed. But this Court might reduce both these points to certainty, were there no other exceptions; and, in that case, the whole costs of the appeal would fall upon the Respondent.

6. On the *sixth* exception, we must observe, that the practice in the *Orphan's Courts* has been to direct the same inquest, which is appointed to make a partition of real estate, if that cannot be done without prejudicing the whole, then to make the valuation. This Court, therefore, will not now undertake to alter this long established practice, though it is liable to some exceptions. But we are of opinion, that the fee in the premises cannot yet be vested in *Thomas Willis*, as he neither paid, nor secured the payment of the valuation money to those who are entitled to receive it.

Upon the whole, let the sentence and decree of the *Orphan's Court* be reversed.

RESPUBLICA *v.* CAMPBELL.

THIS was an inquisition of *Forcible Entry*, &c. taken before two Justices of *Lancaster* county. The proceedings being removed by *certiorari* into this Court, *Bradford* now moved that they might be quashed; and shewed for cause, that the Defendant is stated in the inquest to have been *possessed*, but no estate, or term is laid; which, he said, was adjudged to be insufficient in a case of *Respublica* v. *Scott*, the Court there observing that *Hawkins* was express, that an inquisition of *forcible entry*, &c. will not lie in the case of a tenant at will.

BY THE COURT: Let the proceedings be quashed.

ROSS *v.* CLARKE.

FOREIGN Attachment.—*Clarke*, the Defendant in this case, had obtained judgment upon a *scire facias* against *Ross*, the Plaintiff, as special bail of one *Munro*; and a stay of proceedings was entered until the ensuing term, when *Ross* was to pay the money recovered into Court, if before that time the original debtor had not satisfied the debt. The stay being elapsed, *Ross* paid the money, but upon an apprehension that payment might have been made by *Munro*, though no accounts were received of it, he immediately issued this *foreign attachment* against *Clarke*, and laid it in the hands of the *Prothonotary*.

On a rule to shew cause why the writ should not be quashed, *Moylan* contended, that *foreign attachments* might be laid in any hands whatsoever; that in *England* they issued out of an inferior Court, and, therefore, could not call money from a superior jurisdiction; but that this reason, which governed all the adverse cases determined there, did not apply under the law or practice of *Pennsylvania*. 1788.

Cox, in support of the rule, observed, that there are many instances where attachments would not lie, besides the one mentioned by his opponent. A debt due by recovery on record, cannot be attached; nor goods levied in execution by *fieri facias*. *Com. Dig.* 424. nor property of a sovereign state: *Nathan* v. *Virginia*, *ant.* 77. *in not.* But, he contended, that the mischief would be intolerable, if the effects of one suit could be thus drawn into perpetual litigation by another.

BY THE COURT:—The money is to be considered in the same state, as if it had been paid into the hands of the Sheriff. If a proceeding of this kind were allowed, there could be no end to suits. We are unanimously of opinion, that the *foreign attachment* has issued irregularly and ought to be quashed.

The rule made absolute.

HART et al. *v.* JAMES. 2 Actions.

THESE actions were brought upon three promissory notes, two of which (included in one declaration) had been indorsed to the bank; and the third was in the possession of Messrs. *Hartshorne* and *Large*, as a collateral security from the Plaintiffs, for the payment of a debt amounting to nearly the sum mentioned in the note. In both actions judgments had been entered generally, on the 28th of *April*, 1788, with an agreement in each, that the *quantum* should be ascertained by a reference, and a report made to *next term*. The referees, however, were not appointed until the 8th of *July*, 1788, six days after the commencement of the term, and they made no report until the 5th of *August* following; when *one* report was made in favour of the Plaintiffs, for *one* sum, including what was due in both actions. On the 8th of *August* the Plaintiffs applied for writs of execution; but, upon the *Prothonotary*'s expressing a doubt as to the manner of issuing them, on account of this consolidation of the sums in the report, the Plaintiffs prevailed on the referees separately, and without the consent or knowledge of the Defendant, to sign the following explanatory certificate:—"For the better explanation "of our report in the actions of *John Hart* and *Chamless Hart* "against *Benjamin James*, we find due to the Plaintiffs in the first "action the sum of £. 325 19 5, and, in the second, the sum of "£. 668 2 9."—This certificate was filed on the 15th of *August*, when writs of *fieri facias* were taken out, without giving notice of the report to the Defendant; who, however, accidentally heard of it, and on the 18th of *August*, after the executions were issued, he filed the following exceptions.

1788.

1. That *one* report is made in *two* actions, *severally* referred.

2. That the referees filed a supplementary report without the knowledge of the Defendant, at the instance of the Plaintiffs.

3. That the first report is *on condition*, and therefore the referees have mistaken a plain point of law; the second report being made after their authority had expired.

4. That the promissory notes for which the actions were brought, are not in the Plaintiffs hands, but assigned for a valuable consideration, and, therefore, there is no legal cause of action.

The exceptions being opposed by *Fisher* for the Plaintiffs, and supported by *Ingersoll* and *Dallas* for the Defendant, THE COURT seemed clearly of opinion, that the *first* report could not be maintained; that the supplementary report was irregular; and that the rule of reference to report to *next term*, did not authorize the issuing executions upon the report into office during the vacation (particularly without notice to the Defendant) although a term had intervened between the entering of the rule, and the appointment of the referees.

No opinion was given on the other points, but the execution and report were, for the above reasons, set aside, and the actions, by consent, referred *de novo*.

STARRET's Case.

HENRY STARRET, while attending the Court as a suitor, was taken by a *Ca. Sa.* and *Chambers* moved that he might be discharged from the arrest, citing 4 *Bac.* 421. 3 *Bl. C.* 289. 2 *Stra.* 1024. 1 *Barn.* 17.

Yeates and *C. Smith* opposed the motion, and contended, that there was a distinction between an arrest on *mesne*, and on *judicial*, process; for, though, in the former case, the Court would discharge a suitor, witness, &c. from an arrest made during an attendance upon them, yet, in the latter, they would not, because the party would afterwards be remediless. *Wood*'s *Inst.* 503. 600. 4 *Com. Dig.* 475. 11 *Mod.* 234. 252. There is, likewise, another reason: the *Capias* on *mesne* process might be taken out merely on a suggestion; but in *judicial* process the debt is certain, and fixed by the judgment of the Court.

Chambers and *Hartley*, in reply. The protection of suitors, &c. is established to promote an equal administration of justice, and to prevent the oppression of a rich and powerful man, over a poor one who is soliciting justice. There is no express authority that extends the doctrine to this case; but in 4 *Com.* 575. *tit. Priv.* it is laid down, that an execution shall not be discharged, yet, if the party who procured it, will not consent to a discharge, he shall himself be committed. The books cited in *Comyns*, *Crompton*, and *Wood*'s *Inst.* are of little authority.

M'KEAN, *Chief Justice*.—*Wood* is a writer of great authority, and frequently cited with respect in *Westminster-Hall*. In the case before us, the execution has regularly issued, upon a judgment regularly obtained; and although we should certainly protect suitors, witnesses, and jurors, from an arrest on *mesne* process, during their attendance upon the Court, and for a reasonable time in coming and going, yet no case has been shewn, which will justify our interference, to discharge a man taken *in execution* on the ground of such a protection. It is, indeed, the privilege of the Court that is infringed; and, it is discretionary, to grant it on some occasions, and to refuse it upon others. 1788.

BY THE COURT:—The prisoner must be remanded.*

RESPUBLICA *v.* SPARHAWK.

THIS was an appeal from the *Comptroller General*'s decision, on the trial of which, by consent of the *Attorney General*, *Sparhawk* was considered as Plaintiff.

There was a verdict and judgment *nisi* for the Commonwealth, when *Ingersoll* obtained a rule to shew cause why a new trial should not be granted.

The case was this:—Congress, perceiving that it was the intention of the *British* army to possess themselves of *Philadelphia*, and being informed that considerable deposits of provisions, &c. were made in that city, entered into a resolution on the 11th of *April* 1777, that "a committee should be appointed to examine into the truth of their information; and, if it was found true, to take effectual measures, in conjunction with the *Pennsylvania* board of war, to prevent such provisions from falling into the hands of the enemy."

On the 13th of the same month, the *Pennsylvania* board of war, in aid of this resolution, addressed a circular letter to a number of citizens in each ward of the city, requesting them "to obtain from every family a return of the provisions, &c. then in possession, and the number of persons that composed the families respectively, in order that proper measures might be pursued for removing any unnecessary quantity of supplies to a place of serity." At the same time, it was mentioned, that "this proceeding was not intended to alter or divest the property in the articles removed; but, on the contrary, that the same should be at all times liable to the order of the respective owners, provided they were not exposed to be taken by the enemy."

That no precaution might be omitted upon this occasion, the *Pennsylvania* board of war, on the succeeding day, desired General *Schuyler* to prevent the introduction of further supplies, and to adopt the most effectual means for preventing the departure of the waggons which were then in the city, and for procuring as

* Determined at *Sunbury*, N. P. on the 11th of *November*, 1788, before the CHIEF JUSTICE, and Mr. *Justice* RUSH.

1788. many more as would be necessary to transport, not only the public stores, but also such private effects, as it might be thought expedient to remove.

Several intercepted letters having encreased the apprehensions of Congress, on the 16th of *April* 1777, they resolved, "that it be recommended to the president and members of the executive authority of this State, to request the commanding officer of the continental forces in this city, to take the most effectual means, that all provisions, and every other article, which, by falling into the hands of the enemy, may aid them in their operations of war against the *United States*, or the loss of which might distress the continental army, be immediately removed to such places, as shall be deemed most convenient and secure."

This recommendation was transmitted by the Executive Council to the *Pennsylvania* board of war, who, on the 18th of *April*, passed an order, that "houses, barns, stores, &c. should be hired or seized, for the reception of such articles, as should be sent out of the city by their direction or that of Congress;" and, accordingly, a very considerable quantity of property was soon removed to *Chesnut-Hill*, and placed under the care of Messrs. *Loughead* and *Barnhill;* who gave receipts to the owners, promising "to restore what belonged to them respectively, or to deliver the same to their respective orders."

The enemy, not approaching so rapidly as was expected, a considerable part of this property had, accordingly, been re-delivered to the order of the owners, before the city was entered by the *British* troops; when, however, the depot at *Chesnut-Hill* fell, likewise, into their hands, and, with it, 227 barrels of flour, belonging to *Sparhawk;* being the remainder of 323 barrels that had been originally removed thither, in consequence of the above mentioned proceedings.

For the price of these 227 barrels of flour, with interest from the time of their being taken, *Sparhawk* exhibited an account, amounting to £. 919 6 6 against the public; upon which the *Comptroller-General* reported to the *Executive Council*, that "neither the principal, the interest, nor any part of either, could be allowed;" and against this decision the present appeal was entered.

The question, therefore, on the motion for a new trial, was, whether this claim, under all the circumstances, ought to be admitted? and it was argued on the 28th of *April*, by *Ingersoll*, for the Appellant; and the *Attorney-General*, for the Commonwealth.

On the part of the *Appellant*, it was premised, that, in a season of *peace*, the law had so great a regard for private property, that it would not authorize the least violation of it; no, not even for the general good of the whole community. 1 *Black. Com.* 139. And, it was contended, that, although a state of *war* entitled one nation to seize and lay waste the property of another, and their respective subjects to molest the persons, and to seize the effects of their opponents, yet, as between a state and its own citizens, the principle, with respect to the rights of property, is immutably the same, in war as well as peace. Sometimes, indeed,

the welfare of the public may be allowed to interfere with the immediate possessions of an individual; but these must be cases of absolute necessity, in which every good citizen ought cheerfully to acquiesce: Yet, even then, justice requires, and the law declares, that an adequate compensation should be made for the wrong that is done. For, the burthen of the war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy upon a few. These general principles are fortified by the explicit language of the *Declaration of Rights*, *Sect.* 8. which provides, that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal Representatives." In the present case the Appellant did not voluntarily surrender his property nor was it taken from him by any legislative sanction. 1788.

That there are, however, some instances where an individual is not entitled to redress for injuries committed on his property in the prosecution of puclic objects, must be admitted; but these instances are carefully distinguished by the writers on the law of nations: *Vatt. B.* 3. *Sect.* 232. and are in no degree analogous to the foundation of the Appellant's claim. If, indeed, the property in question had remained in *Philadelphia*, and had there been seized by the enemy, there could have been no reason to claim an indemnification from the public; but, when it was taken out of the possession of the owner by the executive authority of the State, and removed to a distant place, with a promise of restoring it on demand, the subsequent capture being clearly a consequence of this interference, the government is bound to indemnify the Appellant for his loss.

It is unnecessary to travel into an investigation of the various modes, by which an individual may seek for redress and compensation, where his property has been divested for the use of the public. The right is clear, and that every right must have a remedy, is a principle of general law, which the Legislature of *Pennsylvania* has expressly recognized; directing, by an early act of Assembly, the settlement of the accounts of the committee and Council of Safety; and prescribing in what manner the claims of individuals should be settled and discharged. 2 *State Laws* 144. To these bodies, the *Pennsylvania* Board of War succeeded; the business of the Board was transacted in the same way; and there can be no good reason, why the obligations which they incurred, should not be as fairly and fully adjusted and satisfied. The Legislature, indeed, must have regarded the matter in the same light; for, finding that the former law was inadequate to its objects, another was enacted to appoint a *Comptroller General*, and to authorize him "to liquidate and settle, according to law and equity, all claims against *the Commonwealth*, for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers, for the use of the same, or for any other purpose whatever."—This authority embraced the Appellant's claim, and the Comptroller General has erred in deciding against it.

1788. The *Attorney General*, for the *Commonwealth*, stated the case to be briefly this; that the *Pennsylvania* Board of War, acting under the recommendations of *Congress*, removed, among other things, a quantity of flour belonging to the Appellant, in order to prevent its falling into the hands of the enemy; declaring, however, that the removal was not intended to divest the property, but that the flour should still be subject to the order of the owner, provided it was not exposed to a capture. The flour being afterwards seized by the *British* troops at the place where the *Pennsylvania* Board of War had deposited it, two questions arise:—1st. Whether this Court has power to grant relief to the Appellant, if any ought to be granted. And, 2dly. Whether, on principles of law and equity, he is entitled to be relieved.

I. Considering this as a case immediately between *Sparhawk* and the *Commonwealth*, it is clear, that a sovereign is not amenable in any Court, unless by his own consent; 1 *Black. Com.* 242. And, therefore, unless the Commonwealth has expressly consented, there is nothing in the constitution of this Court, which can warrant their sustaining the present proceedings. What then is the evidence of consent? We are referred to the law appointing the *Comptroller General*. Let us examine this law; and as the case comes by appeal from the Comptroller, if it appears that he had no authority to liquidate and settle *Sparhawk*'s claim, it follows, as a necessary consequence, that this Court, also, has no jurisdiction for that purpose.

By the act of Assembly which gives the appeal from the *Comptroller General*'s decision to the *Supreme Court*, 3 *State Laws* 444. this is restricted to such accounts as he shall settle *in pursuance* of the preceding act, by which he was appointed; 3 *State Laws* 57. and there, we find the specific object of his authority to be, the liquidation and settlement of all claims against the *Commonwealth*, "for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers, &c." In order, therefore, to found the jurisdiction of the Comptroller, two things must concur—1st, that the claim be for services performed, monies advanced, or articles furnished; and 2dly, that the debt has been incurred by order of the legislative or executive power.

Now in the present case, the Appellant makes no claim for services performed, or money advanced, and it is impossible for the most ingenious fancy to bring his demand within the description of articles furnished. It is conceded, indeed, that the law does not, *in peace*, acknowledge any authority to violate the rights of property, or to interfere with the possessions of individuals; but there is *in war* a transcendant power, which is connected with the fundamental principle of all governments, the preservation of the whole; and the interest of private persons may certainly, in that season, be sacrificed, *ne quid respublica detrimenti capiat*. The loss, of which the Appellant complains, was occasioned by the exercise of this power. As a *tort* it cannot be charged against the *Commonwealth*; for, a declaration stating it so would be cause of demurrer: And, therefore, as it is only in cases of contract,

either express or implied, that the *Comptroller General* is authorized to act, there is no jurisdiction which can relieve him, but that of the Legislature. 1788.

But, in the next place, the claim does not originate upon any order of the legislative, or executive power, agreeably to the terms of the act. The order for the removal of the provision, &c. to *Chesnut-Hill* was issued by the *Pennsylvania Board of War*, not in obedience to the Executive Council, but in pursuance of a recommendation from Congress, which the Executive Council merely transmitted to the Board. Even, indeed, if the Executive Council had undertaken to direct this proceeding, a question would still arise, whether they had a right to do so? for, the act of Assembly, providing for the settlement of claims against the public by order of the Executive Council, though not in express words, yet, by a necessary implication, must intend a legitimate order, founded upon the constitutional powers of that department, or issued under the authority of some law. The Executive Council cannot otherwise charge the public; without the legislative sanction they cannot erect magazines, or any other public buildings; nor enter into the most trifling contract; of which, indeed, a recent proof appears, in the refusal of the General Assembly to pay for the arms of the State, that had been placed in the Supreme Court, or to discharge the additional expence of the triumphal arch, which had been incurred by the direction and upon the faith of the Executive Council.

II. But, it is further to be shewn, that, even supposing the *Comptroller General*, or this Court upon appeal, had the power of granting *Sparhawk*'s claim, yet, that the claim itself is not founded in law or equity, and ought, therefore, to be rejected.—If the Appellant's claim is just, he ought either to urge it against the immediate agent in the wrong which he has sustained, or travel to the source, and demand reparation from Congress. The *Commonwealth* of *Pennsylvania* cannot be liable; for, the persons who took and kept the provisions, &c. at *Chesnut-Hill*, acted under the authority of the Board of War, who, it is true, were appointed by the Executive Council; but in this instance, proceeded entirely upon the recommendation of Congress, which the Executive Council did not, and could not legally enjoin or enforce. It is possible, however, that in strict law, Messrs. *Loughead* and *Barnhill* would have been liable as trespassers, had not the Legislature interfered to protect persons in their situation from vexatious prosecutions: 3 *State Laws*, 178. And this act, although it relates immediately to individuals, shews, generally, that the temporary bodies, by whose orders such individuals, were governed, are, likewise, to be exempted from suits, on account of their conduct in the service of their country.

But, on what ground can redress be at all expected on this occasion? The removal of the Appellant's property arose from the necessity of the war; it was not done to convert the flour to the public use, nor to deprive the owner of the advantages of it, any farther than the paramount consideration of the public welfare

1788. required. The object was to secure it from the depredations of the enemy; and, that it, afterwards, fell into their hands, was an event involuntary, and merely accidental, in which case *Vattel* expressly says, no compensation shall be made. *Vatt. lib.* 3. *sect.* 232. If the Appellant is entitled to relief, every farmer whose cattle have been driven from his plantation to avoid the enemy; every man whose liquors have been staved, or provisions destroyed, upon the approach of the *British* troops; all the owners of *Tinicum* island, which was deluged by a military mandate; and, in short, every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified—What nation could sustain the enormous load of debt which so ruinous a doctrine would create!

Ingersoll, in reply.—With respect to the *first* point made on the part of the Commonwealth, it is not contended, for the Appellant, that, generally speaking, citizens may sue the State; but only that every Government, which is not absolutely despotic, has provided some means (in *England*, for instance, by petition in Chancery) to obtain a redress of injuries from the Sovereign.

As to the *second* point;—The Pennsylvania Board of war acted under the authority of the Executive Council; and the principal is responsible for the agent. When the Appellant's property was taken out of his own custody, the government stood in his place, and undertook all the consequent risques. The individuals, who were charged with the care of it, are protected by the act of Assembly; but the State, upon every principle of justice, is still liable for the loss; and the authority of the *Comptroller General* was intended, and has always been understood, to be competent for granting the satisfaction which is now claimed.

The Chief Justice, after stating the case, delivered the opinion of the Court as follows:

M'Kean, *Chief Justice*.—On the circumstances of this case, two points arise:

1st, Whether the appellant ought to receive any compensation, or not? And

2dly, Whether this Court can grant the relief which is claimed?

Upon the *first* point we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened *flagrante bello;* and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a *trespass;* which, from the very nature of the term, *transgressio*, imports *to go beyond* what is right. *5 Bac. Abr.* 150. It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the *rights of necessity*, form a part of our law.

Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure. 2 *Black. Com.* 36. So, if a man is assualted, he may fly through another's close. 5 *Bac. Abr.* 173. In time of war, bulwarks may be built on private ground. *Dyer.* 8. *Brook. Trespass.* 213. 5 *Bac. Abr.* 175. and the reason assigned is particularly applicable to the present case, because it is for *the public safety.* 20 *Vin. Abr. (trespass) B. a. sec.* 4. *fo.* 476. Thus, also, every man may, of common right, justify the going of his servants, or horses, upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. 1 *Ld. Raym.* 725. The pursuit of *Foxes* through another's ground is allowed, because the destruction of such animals is for *the public good.* 2 *Buls.* 62 *Cro. I.* 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man. *Keyl.* 46. 5 *Bac. Abr.* 177. 20 *Vin. Abr. fo.* 407. *sec.* 14. Houses may be razed to prevent the spreading of fire, because for the public good. *Dyer.* 36. *Rud. L. and E.* 312. See *Puff. lib.* 2. *c.* 6. *sec.* 8. *Hutch. Mor. Philos. lib.* 2. *c.* 16. We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is mentioned, that the *Lord Mayor of London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the lawyers of the temple, then on the circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt. 1788.

We are clearly of opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss.

With respect to the *second* point;—This Court has authority to confirm, or alter any proceedings, that come properly before the *Comptroller General;* but if he had no jurisdiction, we can have none. It appears then, that his power is expressly limited to claims "for services performed, monies advanced, or articles furnished," by order of the Legislature, or the Executive Council. And, as he has no right to adjudge a compensation from the State *for damages*, which individuals may have suffered in the course of our military operations, we are of opinion that we could grant no relief, even if the Appellant was entitled to it.

By the Court:—Let the rule be discharged; and the Judgment for the Commonwealth be made absolute.

Common Pleas,

PHILADELPHIA COUNTY.

December Term, 1788.

KUNCKLE *v.* KUNCKLE.

EXCEPTIONS were filed to the report of referees in this cause; which were argued on the 20th of *November*, by *Wilson* and *Todd*, for the Defendant; and *Sergeant* for the Plaintiff.

The PRESIDENT now stated the material circumstances; and delivered the opinion of the Court as follows:

SHIPPEN, *President.*—This is a motion to set aside the report of referees, on two grounds: 1st, For the misbehaviour of the two referees, who signed the report, in deciding the dispute without notice to the third referee, who did not sign it. The evidence by no means supports this objection, as it appears that the two referees had agreed upon the substance of their report in the presence of the third referee, who declared his disagreement, and said the others could make the report without him.

The 2d objection is to the report itself, as awarding money to be paid by the Defendant on one side, and the making conveyances of land and a lot of ground, and taking up a bond and mortgage in the Loan Office, by the Plaintiff, on the other side. The ground of this objection is, that the Court cannot do complete justice on both sides, as an execution may issue for the money against the Defendant, and the Plaintiff cannot be compelled by the Court to perform his part; at least, that the remedies are not the same on both sides, namely by *execution.*

The determination of causes by referees under a rule of Court, has been found a practice of such general convenience and utility, for the speedy and equitable decision of controversies depending in the Courts of law, that the Judges have always encouraged and supported it; more especially as in this mode of trial, the referees are not tied down by the strict rules of law, but may decide as the equity of the case may appear, and in some sort supply our want of a Court of Chancery. As the referees are Judges of the parties own chusing, we never enter into the merits of the causes they decide, nor, in general, set aside their reports but for misbehaviour, or where the objections arise on the face of the proceedings. 1788.

Where a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the Court cannot inforce both, they will certainly inforce neither. In the present case, the question will be, whether they can oblige the Plaintiff to perform his part of the award? They certainly cannot do it by *execution;* but if they can do it by *attachment*, the remedies are mutual, though not by the same kind of process. That an attachment will lie for a contempt in not performing an award of referees appears clearly to have been agreeable to the common law prior to the statute of 9 *and* 10 *W.* 3. which is declared by the Judges, and appears from a perusal of the act itself, to have been made only to put agreements to refer cases never instituted in Court, upon the same footing with causes already in Court, and to be declaratory of what the law was before in the latter cases.

I have inspected the record in the case of *Stuart* v. *Ralston* in the *Supreme Court*, and the judgment in that case seems decisive on the present question. There the award was that money should be paid by the Defendant to the Plaintiff, and that the Plaintiff should, at a future time, when certain proceeds of pot ash should come to his hands, and when a certain debt should be received, pay the amount of one half of them to the Defendant: The objection with regard to the time of the Plaintiff's performing his part of the award was much stronger than in the present case; which requires that it shall be done within five days after payment of the money.

In all cases of this kind the Court will exercise their equitable powers, in such a manner, as not to suffer either party to elude the performance of their part of the award. If, for instance, execution should be taken out by the Plaintiff against the Defendant, and any well grounded suspicions should appear, that the Plaintiff was contriving by flight, or otherwise, to avoid complying with his part, the Court would order the money levied to be lodged in Court till the Plaintiff should comply; or might impose such other terms upon him as should appear necessary to oblige a compliance.

As to the objection that part of the award is impossible to be complied with, the Defendant himself having taken up the Loan Office Security, which was directed by the referees to be done by the Plaintiff; it is evident from the time of its being done, that it was with a view of making the present objection, it being done

1788. two days after the referees had agreed upon their report, though before the actual signing of it. This, however, is no legal objection, because if any part of an award be impossible to be performed, it appears by a case in *Salk.* 83. that the Court will refuse an attachment for that part. Yet, as the Plaintiff in the present case would receive the benefit of what the Defendant has done in taking up the security, we should certainly think it equitable that he should abate so much out of the money to be recovered, and upon application would oblige him to do it; and, in general, see that the report was carried into execution in all its parts, agreeably to the intent of the referees, and the justice of the case.

We therefore confirm the report.

GORGERAT *et al.* v. M'CARTY.

ON a rule to shew cause why the Defendant should not be discharged on common bail, *M'Carty* stated in his deposition, that, being considerably embarrassed, he had, according to the laws of *France*, declared himself a bankrupt by filing a statement of his debts and credits, and delivering all his books and papers into the Consular Court of *L'Orient*, for the benefit of his creditors; *the principal part* of whom, in consequence of this surrender, had met together, appointed trustees, or *Syndics*, in the usual form, and then granted him a letter of licence for three years, together with a power of attorney, to collect his outstanding debts in *America*, in order to remit the same for their use; stipulating, however, that he should return to *France* within one year from the time of his departure. The Plaintiff, among others, had proved and registered his debt in the Consular Court; and, it was agreed by the Council for both parties, that, on a surrender of this description; if three fourths in value of the creditors had consented to the Defendant's discharge, the agreement or composition by them signed, being *homologaté*, that is to say, recorded and confirmed by the Court of Parliament, (which is a matter of course unless fraud is shewn) became by the *lex loci* obligatory upon the non subscribing creditors.

Ingersoll, in support of the rule, contended, that it was settled by the decisions in *Millar* v. *Hall* (ant. 229.) and *Thomson* v. *Young* (ant. 294.) that a discharge under the laws of one country, operated as such in every other; and he offered to prove by the testimony of the Defendant himself, that three fourths in value (the deposition only stating that *the principal part*) of the creditors had agreed to the composition at *L'Orient*; observing, that, if this would be sufficient to induce the Court to order an *Exoneretur* after judgment, it would also be sufficient to induce them to discharge the Defendant in the present stage of the cause.

Du Ponceau, having read a positive affidavit of a subsisting debt, opposed the admission of the Defendant's testimony. He said,

that, even if *M'Carty*'s discharge according to the *lex loci* could be actually proved, it would not operate against the Plaintiff on a motion of this kind. The mutual spirit of intercourse among nations has, indeed, introduced a more liberal idea of the *cessio bonorum;* and, upon the trial of the cause, such proof would probably be fatal to the Plaintiff's demand: but, whether he is discharged, or not, is a matter of fact, to be decided by the verdict of a jury; *Salk.* 100. and to deprive the Plaintiff of special bail, at this time, would not only be an illegal anticipation of that decision, but, in effect, a denial of justice, as it appears that the Defendant is under an obligation to repair shortly to *France*, and would probably never venture again within the jurisdiction of this Court. 1788.

He contended, however, that, even by his own shewing, *M'Carty* had not been discharged in *France;* and represented, that the proceedings in the Consular Court amounted to no more than an inchoate bankruptcy; for, the concurrence of three fourths in value of his creditors to the composition alleged, and the *homologation* or confirmation thereof by the parliament, being an indispensable requisite to his discharge, 'till that was established, it could not avail the Defendant that he had made a surrender, or that the Plaintiff had proved his debt, any more than the surrender of a bankrupt here, or the proof of a debt under the commission, would be sufficient to preclude a creditor from his remedy at law, before a certificate was actually granted.

Nor is the Defendant's testimony, he urged, competent to prove the fact, which, by the *lex loci*, operates as a discharge; it is a matter to be shewn by an exemplification of the foreign record; when, perhaps, it may be tantamount to a bankrupt's certificate; or, with stricter analogy, it may be compared to the case of a discharge under the composition law of *England;* and he cited a case which he said was exactly in point from *Salk.* 99. *pl.* 7. where the Court, on a question of bail, would not allow the Defendant to shew that he had obtained his discharge under that act, and that the Plaintiff was bound, though a non subscriber, to the composition.

Ingersoll, in reply, said, that he did not mean to contend, that the debt was discharged; but only to shew, by the testimony of the Defendant, a collateral fact, which entitled his person to an exemption from arrest in the present case. He agreed that the proceeding amounted only to an inchoate bankruptcy under the insolvent laws of *France;* but, he insisted, that it would be cruel and unjust to allow the Plaintiff all the advantage of his concurrence there, and likewise the benefit of special bail in an action here. Although it may be true; therefore, that the Defendant had not yet received what would amount to a certificate, yet, as he has surrendered all his effects, muniments, and vouchers, to the proper officers, for the benefit, and with the knowledge and approbation of the Plaintiff, as well as his other creditors, the Court will not suffer the oppression that is now attempted, but rather incline to hear the Defendant in favour of the rule; and, if it can

1788. be shewn that three fourths in value of his creditors have agreed to his discharge, the established principles of law will protect him here from the molestation of a refractory individual.

SHIPPEN, *President*.—There are certain rules adopted for the government of the Court in respect to bail, which, as they are consonant to law and reason, ought not to be wantonly violated. In cases of necessity, however, these rules admit of some relaxation; as where it is impracticable to obtain a positive affidavit of the debt, the Court, being satisfied of its existence by collateral proofs, will order special bail to be entered.

But the present question is not of that nature; for the matter alleged in support of the rule, goes immediately to the merits of the cause, and cannot, with any propriety, be considered as a fact merely collateral. It is, in effect, saying, that the Defendant has paid the Plaintiff's debt; which surely cannot be tried on a motion of this kind; nor can it at any time be substantiated by the testimony of the Defendant himself.

I think, indeed, that the liberality of our Courts has already extended the benefits of a *cessio bonorum* in another country, as far as prudence will justify. In the cases of *Millar* v. *Hall*, and *Thompson* v. *Young*, there had been a general surrender for the benefit of all the creditors; and judgments of *discharge from their respective debts*, were regularly pronounced and certified in favour of the Defendants by the Court of a sister State. This distinguishes these cases from the case of *James et al.* v. *Allen* (ant. 188.) where the Defendant's *person only was discharged*, under a law of *New-Jersey*, clearly local in its terms and operation: And, in the case of *Le Clercq* v. *Richette* our opinion, in directing the Jury to find for the Defendant, was founded upon the evidence that the Plaintiff was a party to the proceedings in *France*, and that an actual discharge had been obtained conformably to the laws of that kingdom.

From these decisions it may be collected, that the judgment of a foreign Court discharging the debt, would, for that purpose, be recognized here; but it would be contrary to reason, justice, and law, to protect a man from arrests, who had made his way to this country before he obtained his certificate, merely because he had committed an act of bankruptcy and surrendered to the commissioners in *England*. The objections are equally strong upon the present occasion; for, it is clear, that the proceedings, which have hitherto taken place in the Consular Court of *L'Orient*, are inchoate and inconclusive; and, even if the Plaintiff had signed the letter of licence for three years, that, according to an express authority in *Barnes*, would not be a sufficient cause for refusing special bail.

Upon the whole, THE COURT are clearly of opinion, that the Defendant is not entitled to be released on common bail; and, therefore, direct

The rule to be discharged.

WATERS v. MILLAR. 1788.

ON a motion in arrest of judgment after a verdict for the Plaintiff in this cause, it appeared, that the Defendant had given his note of hand to one *Jesserow*, which was expressed in these words: "I promise to pay, or cause to be paid, unto *George Jesserow*, or order, the full sum of £. 20. against or before the 27th "day of *November*, 1785."—This note was afterwards sold and delivered, for a valuable consideration, by *Jesserow* to the Plaintiff, but without any indorsement or written assignment; and the Defendant having refused to pay it, this action was instituted, in which the declaration, after stating the note, &c. proceeded as follows:—"And whereas the said *George* afterwards, to wit, on the "4th day of *November*, in the said year, in the city and county "aforesaid, the said £. 20. being wholly unpaid, for a valuable consideration to him by the said *Nicholas (Waters)* then and there "paid, bargained and sold the said promissory note to the said "*Nicholas*, and possession thereof to him then and there delivered; and in consideration whereof the said *Jacob (Millar)* afterwards, to wit, the same day and year last aforesaid, at the "city and county aforesaid, at the special instance and request of "the said *Nicholas*, assumed upon himself, and then and there "promised the said *Nicholas* that he would pay him the said £. 20. "according to the tenor and effect of the said note. Nevertheless the said *Jacob* the said sum of money, according to the tenor and effect of the said note, hath not paid unto the said *Nicholas*, &c."

The question was, whether the Plaintiff could maintain the present suit in his own name, upon the mere sale and delivery of the note, without any indorsement or assignment from *Jesserow* to him?

Sergeant, for the Defendant, having premised, that, if there was a consideration, it was immaterial to lay a promise to pay the note, and, on the other hand, that, if there was no consideration, the promise was nugatory and void, contended, that a promissory note, being a *chose in action*, was not assignable by writing at common law, much less by delivery alone; *Cun. L. B. E.* 105. 5 *Bac. Abr.* 605. *Salk.* 129. *Ld. Raym.* 757. 774. and that this could not be likened to a note payable to *bearer*, where possession gives the action; *Cun. L. B. E.* 129. but it is the case of a note payable to one, *or his order*, which order must be in writing to bring it within the statute. As, therefore, no indorsement, or assignment, is laid, the action cannot be maintained, in its present form. It is true, that the assignee of a bond may sue in the name of the obligee; and the Plaintiff might sue in the name of *Jesserow*; but, in that case, the Defendant could prove a set off, and shew the balance to be in his favour. Of this advantage he would now, perhaps, be deprived; nor would this action be final if a *bona fide* indorsee of *Jesserow* should hereafter appear.

Rawle, in opposing the motion, observed, that the verdict had cured all exceptions to the expressions of the declaration, and that

1788. the Plaintiff had an equitable right to recover, having bought the note for a valuable consideration; which, of itself, was sufficient to induce the Court to consider him as agent, or attorney, to do what *Jesserow* might have done; and an attorney, &c. who has a naked authority to receive, may sue in his own name on a promise to pay to him. *Lev.* 188. 1 *Vent.* 318. 332. 2 *Black. Rep. Term. Rep.* He then insisted, that the sale and delivery were a good assignment without *writing;* which is not necessary to a contract, otherwise than as evidence of it; 3 *Burr.* 1670. and he contended that there was a sufficient consideration for the *assumpsit* laid in the declaration; that being, he said, the material ground of the action, and not, as the adverse Council suggested, the mere possession of the note; that the Plaintiff's receipt for the money would be a sufficient discharge from any claim on the part of *Jesserow;* and that, even if the promise were not strictly laid in the declaration, the practice of overlooking similar inaccuracies, in order to promote the justice of the case, would supply that defect. 3 *Bl. Com.* 394. *Salk.* 29. 1 *Wils.* 255. 3 *Wils.* 40. *Salk.* 364. 1 *Sid.* 218. 1 *Vent.* 40. There is, however, at least, so much consideration for the *assumpsit* as the possession of the note; and the question of damnification could not come before the Court on the present motion, which is in arrest of judgment, and not for a new trial.—See *Cro. E.* 67. *Hob.* 4. 1 *Sid.* 31. *Styl.* 296. 1 *Com. Dig.* 138.*

SHIPPEN, *President.*—This is a motion in arrest of judgment, on the ground that no consideration is laid in the declaration to found the *assumpsit* upon: And as it tends to destroy the Plaintiff's action after a verdict given in his favour upon the merits, the Court would afford every aid in its power, consistently with law, to carry the verdict into effect; but they must not depart from the established principles of law, which are wisely calculated for general cases, although in particular ones they may sometimes appear to be hard.

The declaration states, that "the Defendant *Jacob Millar* gave "his promissory note to one *George Jesserow* for £. 20. payable "to him or his order; that by virtue of the statute the said *Jacob* "became thereupon liable to pay to the said *George*, or his order, "the said sum of £. 20. That the said *George* afterwards for a "valuable consideration *bargained and sold* the said note to the "Plaintiff, and delivered him possession of it; and that in *consi-*"*deration thereof;* the Defendant assumed and promised to pay "the £. 20. to the Plaintiff, *according to the tenor and effect* of the "said note."

The question is, whether the *sale and delivery* of the note to the Plaintiff is of itself, *without any indorsement or assignment*, a legal ground of the *assumpsit;* for no other consideration is laid.

The note is a negotiable note, payable to *Jesserow*, or his order; the remedy, therefore, as upon the instrument itself, is confined to *Jesserow*, or his order; and it would, indeed, be confined to *Jesserow* himself, as a *chose in action*, if the act of Parliament, or act of Assembly, did not enable an assignee to sue in his own

* 7 *Mod.* 12.

name. There must then be some collateral matter, some injury to the Plaintiff, or benefit to the Defendant, *in the consideration itself*, laid as a ground for the assumption. If the Defendant had promised to the Plaintiff, having possession of the note, and a power to sue for the money (though not in his own name) that if he would forbear to sue him, he would pay it; or, if the promise had been in consideration of his delivering the note up to be canceiled; these promises, though made to a person not having an assignment of the note, would perhaps have been sufficient to ground an *assumpsit* upon. But this is a bare promise to pay to the Plaintiff, a stranger, in consideration of a sale and delivery of the note by the payee to him, a consideration moving neither to, nor from, the Defendant, and which could not redound either to his benefit or injury.—Besides, the promise laid, is to pay to the Plaintiff, *according to the tenor and effect of the note*, and the tenor and effect of the note was to pay to *Jesserow, or his order*, and not to any person to whom he should sell and deliver it. If the note had been payable to *Jesserow, or Bearer*, a *bona fide* purchaser of it might have maintained the action; because such notes pass by delivery: But a note payable to *order*, must be *assigned*, to enable the holder to bring the action in his own name. 1788.

Bonds in *England* are every day assigned, attended with irrevocable powers to sue for the assignees use: Such an assignment one would think would be full evidence of a sale and delivery, yet no actions are ever brought on that ground, but always in the name of the obligees.

We would intend every thing we could to support the verdict; but we cannot intend a consideration quite different from that which is laid, which we must do in the present case, if we were to give our opinion in favour of the Plaintiff.

The judgment, therefore, must be arrested.

GIBBS v. GIBBS.

THE case was briefly this:—A certain *Aaron Musgrove* had brought a *qui tam* action against the Defendant, *Ann Gibbs*, in which, after a trial in the *Supreme Court*, he obtained a judgment *on the second day of October*, 1788; but no execution was thereupon issued. On the fourth day of the same month, however, the Defendant having then confessed judgment in this Court to the Plaintiff, *Benjamin Gibbs*, a *Fi. Fa.* was issued in this cause, and duly executed upon a house and lot of ground in *Philadelphia*; after which Mrs. *Gibbs* committed an act of bankruptcy, and the Sheriff paid the money levied by virtue of the *Fi. Fa.* into the hands of the Prothonotary, to be disposed of as the Court should direct.

In the course of the argument, there were some insinuations of collusion, with respect to the second judgment; but as no proof was offered, the only question before the Court was, whe-

1788. ther, under all the circumstances of the case, *Musgrove*'s prior judgment was entitled to satisfaction out of the money levied on the *Fi. Fa.* in preference to the subsequent judgment on which the writ had issued? See 3 *State Laws* 655. *sect.* 30.

Bradford and *Sergeant*, arguing in favour of the prior judgment, admitted, that it was no *lien* against the assignees of the bankrupt, or the general creditors under the commission; but contended, that, unless it was for the general benefit, no construction of the act of Assembly should be made to divest the lien which the priority of *Musgrove*'s judgment had obtained: a lien, they insisted, clearly binding as to a purchaser, and, consequently, as to a person levying on real estate, who is to be considered, in that respect, a purchaser. They said, that they had not been able to find any authority more in point than 1 *P. Will.* 737. but urged, that the want of a direct precedent was in their favour; for, if the attempt to destroy a lien of this kind could have succeeded, it must frequently have occurred in the uniform struggle that had been made to defeat the bankrupt laws of *England*.

It was further observed, that there had been no *laches* on the part of *Musgrove*, for he could not issue an execution 'till the expiration of four days after his judgment was obtained; that it was established long before the statute of frauds, that the first judgment shall be first paid, although the execution was issued upon a subsequent one; that the statute and our act of Assembly made no other alteration in the common law, than that of substituting the day of docketing for the relation to the first day of the term; and that, therefore, independent of the bankrupt law, *Musgrove*'s claim was indisputable.

But they also contended, that, taking the bankrupt law into view, it did not interfere between lien and lien at common law; but is merely directory in the 30 *sect.* how the debts shall be paid where no execution has been levied. The words do not include the case; and a former statute, or rule of common law, cannot be repealed or annulled, by implication. Nor could the intention of the Legislature embrace it; for, that was to make an equal distribution among the creditors at large; and not to ascertain a right, as between two individuals. Whether, indeed, it is a real or pretended debt for which the second judgment is confessed, there are no means to prove from the want of a Court of Chancery; and whether the commissioners might recover the money from *Musgrove* is a question, that cannot affect the present controversy, or give *Gibbs* a right to retain it, which he would not otherwise have.

Ingersoll and *Lewis*, for the Plaintiff in the execution, stated, that by the bankrupt law, executions, mortgages, and pledges, were considered in the same light; and that the rule of law in the distribution of a bankrupt's estate, placed all other descriptions of creditors on the same footing, regarding the *quantity*, and not the *quality* of their debts. *Green. B. L.* 100. 101. 136. 146. 190. 12 *Mod.* 446. *Com. Dig.* 532. 2 *Black. Com.* 487. 1 *Bac. Abr.* 258. They insisted, as the property would indisputably vest in

the commissioners if not prevented by the execution, that, therefore, the question lay properly between *Gibbs* and the Assignees, and not between him and *Musgrove*, who could not, with any shew of right retain the money against the general creditors, even if the Court were, at this time, to order it to be paid to him. They said, that the very points now made, were urged and overruled in the case cited for *Musgrove*; 1 *P. Wm.* 737. and it is declared in several cases, that a judgment did not bind lands any more than the *teste* of a *Fi. Fa.* did goods, before the statute. *Ibid.* 92. *Ves.* 239. 436. 1788.

But the very existence of a prior lien in favour of *Musgrove* was controverted; because the act of Assembly (1 *State Laws* 462. 3.) in respect to the docketing of judgments, only alters the law in the case of *bona fide* purchasers for a valuable consideration; and does not affect the case of two judgment creditors, whose liens still relate to the first day of the term. On this ground, therefore, the judgment confessed to *Gibbs in the Common Pleas*, is prior to that obtained by *Musgrove in the Supreme Court*; for the term in the *Common Pleas* commenced *on the 7th of September*; but the term in the *Supreme Court* did not commence until the 24th day of the same month; so that, independent of the bankrupt law, the legal relation to the first day of the term establishes the right of *Gibbs* on the present controversy.

But the bankrupt law is in itself clearly decisive; and that an adverse precedent is not to be found, must prove the universal sense of the Courts of Justice in *England* to be in favour of the Plaintiff's doctrine. As, therefore, the general rule, with regard to an execution executed, includes his case, and excludes the case of *Musgrove*, it is incumbent upon the latter to shew, if he can, any exception on which he may rest his present claim. The principle, indeed, as well as the practice of the law, is on the same side. If, after the execution executed, the commissioners had taken the house and sold it, they would, undoubtedly, have been liable to *Gibbs* in an action for money had and received to his use: but will it be asserted that *Musgrove* could maintain such an action, having no execution executed? Nor can it be justly said, that the commissioners are not interested in the question now agitated; for, if the proceeds of the estate sold under the *Fi. Fa.* are enough to pay both, both, according to the opposite doctrine, must be paid, and only the balance go to the commissioners. But there is no case which can make a difference whether the money is, or is not, sufficient to pay the amount of the execution; and should *Musgrove* prevail against *Gibbs*, for similar reasons he must prevail against the commissioners—to the manifest violation of the words and spirit of the law.

Shippen, *President*.—The motion in this case is made in behalf of one *Musgrove*, who is said to be a prior judgment creditor, in order to have the money which has been levied and brought into Court under the Plaintiff's execution, paid to him instead of the Plaintiff.

1788. This is objected to, on the ground that the Defendant became a bankrupt previous to the serving or issuing any execution against the estate, except the present one, at the suit of the Plaintiff, and that, therefore, he alone is entitled to the money.

The question arises upon the 30*th section* of the bankrupt law, which enacts, "That every creditor having security for his debt "by judgment, speciality, or other security, whereof there is no "execution served and executed upon the lands, goods, and es- "tate, of the bankrupt before such time as he shall become a "bankrupt, shall not be relieved upon any such judgment, &c. "for any more than a rateable part of their debts, with the other "creditors."

This section of the act is similar to one in the statute of *James*, and must therefore receive the same construction; and the rational and legal construction appears to be, that no judgment creditor who has not levied his execution, shall receive any benefit from his judgment, *as to the estate or effects of the bankrupt, vested in the Commissioners of bankruptcy* by the act, *to the exclusion or prejudice of the creditors at large*, but must be put upon the same footing with them; yet, as to any liens which do not affect the general creditors, he will have the benefit of them in the same manner as if the act had never been made.

This construction accords with the case cited in support of the motion out of 1 *Peere Wms.* 737. The principle of that case, so far as respects the present purpose, is this, that where there is a prior judgment, and afterwards a sale of the land, and then a bankruptcy, the purchaser holds the land *subject to the prior lien*, which must be for this plain reason, that in that case there was no possibility that the creditors of the bankrupt could be prejudiced by it, the land being actually sold before the bankruptcy, and never vested in the commissioners; and, consequently, there *was no lien as to them*, it could only subsist against the purchaser, and was not at all affected by the bankrupt laws, as it was indifferent to the creditors whether it subsisted or not.

In the present case, there has been no act of the party previous to the bankruptcy to prevent the vesting of the estate in the commissioners; and, consequently, all liens, if they operate at all, must operate to their prejudice; which is contrary to the express intent of the act, which directs that they shall take the estate, subject only to the claims of such judgment creditors who had levied their executions upon it. For, if any judgment creditor, who has no execution, under the idea of his having a prior lien, could have the benefit of the execution transferred to him, then not only that creditor, but all the prior judgment creditors must be satisfied, before the commissioners could take any thing to divide among the general creditors, as they would all have an equal right with him.

It is said, that, although the Court should order the prior judgment creditor to be first paid, there would be no injury done to the other creditors, because the commissioners might recover the money from him, if he was not entitled to it. Whether they

could, or could not, recover it from him, will, I think, make no material difference as to the present motion. It must, however, be observed, that, if he can claim this money at all, it must be *under the execution*, and as execution creditors are saved, it would be very questionable whether the commissioners could recover it from him. If they *could not*, then the creditors at large must be postponed to him and the other judgment creditors;—if they *could* recover it, then it would not only be a vain thing to order the money into his hands, as he must, by a circuity of action, be obliged to refund it, but it would, in fact, be ordering it into the hands of a person not entitled to receive it: And the consequence would be, that the real execution creditor, whose claim is saved by the act, would infallibly be cut out of his preference. 1788.

Whether this is, or is not, a *bona fide* debt, is not the subject of our present enquiry. If any fraud could be proved, this Court would certainly on motion set aside both the execution and the judgment, but that could not be for the benefit of the prior judgment creditor, whose claim is founded *upon the execution;* but for the benefit of the creditors at large under the commission; who may still have a remedy by action, if they can shew the execution to have been collusive and unfair.

The only question, however, now before us, is whether a prior judgment creditor shall come in under this execution, which we think he cannot, as it would defeat the express intent of the bankupt law.*

M'CLENACHAN et al. v. M'CARTY.

THIS was a foreign attachment, in which judgment was entered at the third term; and a writ of inquiry being afterwards executed, a motion was made, on behalf of the Defendant, to quash the return, because the Sheriff and inquest had refused to hear his evidence at the time of executing the writ.

On the argument the nature of the evidence that had been excluded, was stated, and *Ingersoll*, in support of the motion, contended—1st, That, upon general principles, both parties are entitled to be heard before the inquest; and that, although they are bound to find some damages, yet, if there is no proof of any being sustained, they will find no more than a single penny; and that merely to satisfy the form of the proceeding. The writ commands the inquest *diligently to enquire what damages*, &c. so that to inform their consciences, they ought certainly to hear the allegations of both parties; and if they assess the damages too high, or too low, their return will be set aside, which proves that the Court has a superintending power over Juries of Inquiry. 2 *Lill. Abr.* 721. 2 *Sayre's Law of Dam.* 123. 193. 203. 233. It is a maxim, indeed, that damages cannot be assessed without a Jury. 3 *Bl. Com.* 395. 396. 7. and it is clear that under the rules at

* See 2 *Dall. Rep.* 158.

1788. *Nisi Prius*, a Defendant may submit to judgment being entered, and yet contest the matter before the Jury of Inquiry, so as to affect the *quantum* of damages, for which the judgment shall stand. 2dly, The case of a *foreign attachment* makes no exception to the general rule. In *London* only actions of debt can be brought within the custom; so that the judgment being complete, no damages are to be assessed. There are many other points in which the *custom of London* differs from the practice under our attachment law. Lands, and, in short, every other subject of property, are liable in *Pennsylvania* to an attachment; being as much so in his absence, as the Defendant's person would be, if he were here. But the *custom of London* proceeds only on the supposition of a debt due from the Garnishee to the Defendant. Hence the analogy between the custom there, and our practice, is very trifling. The act of Assembly does not prescribe a writ of inquiry: nor does the freeholders law, upon a judgment by default after summons; yet, in both cases, writs of inquiry are uniformly issued to assess damages; and for the plain reason already assigned, that damages cannot be assessed without the intervention of a Jury. Besides, it has been the uniform practice under the attachment law to give notice of executing the writ; which necessarily implies a right to controvert the *quantum* of damages; and the question is not whether the evidence would have availed, but whether it ought to have been heard.

Wilson and *Wilcocks* for the Plaintiffs.—It is in the power of the Defendant to appear, and entitle himself to a trial in Court; but it would be unjust in this manner to permit him to draw the decision of an important question from the proper tribunal. Admitting, however, that the law is what the Defendant's Council states, where a party is completely in Court, and afterwards suffers judgment to go by default, it is not applicable to the case of an attachment, the object of which is to compel an appearance. The custom of *London*, which is certainly the ground-work of our attachment law, admits no such privilege as the Defendant now claims. In *London* the Plaintiff is not obliged to execute a writ of inquiry, or to prove his debt in Court, but merely to swear to it; nor does any expression in our act of Assembly enjoin the execution of a writ of inquiry; but that, as well as the notice in office, depends entirely upon usage; for, the only trial mentioned in the act is on the *scire facias* between the Plaintiff and Garnishee. Nor does the Legislature precipitate the cause: judgment cannot be entered 'till the third term, and twelve months afterwards are given to obtain a trial upon the merits. In this action, likewise, the Plaintiff acquires no general lien by his judgment, as in other actions, but can only issue execution against the property attached: so that, upon the whole, there can be no reason, on principles of equity, that the Defendant should be heard without putting in special bail. The freeholders act can furnish no argument; for the law in that case prescribes a mode by

which the Defendant shall be brought into Court; but, in an attachment, the Defendant is never in Court until bail is filed. 1788.

SHIPPEN, *President*.—This is a motion to set aside the inquisition of a Jury of inquiry in a foreign attachment, on the ground of the Defendant's evidence being refused to be heard before the Sheriff and inquest, on the execution of the writ of inquiry.

On the part of the Plaintiffs two points have been made and argued:—

1st, That on the execution of writs of inquiry generally, no evidence on the part of the Defendant ought to be heard, as by suffering judgment to go by default, he had admitted the Plaintiffs cause of action; and that, therefore, evidence on the part of the Plaintiffs only should be heard.

2dly, That, although it were admitted, that, generally, on executing writs of inquiry, after an interlocutory judgment, such evidence might be heard; yet, in those cases where writs of inquiry are executed to ascertain the Plaintiff's demand, after judgments on *foreign attachments*, no such evidence should be admitted; because the foreign attachment issues only to compel an appearance, and the Defendant has it in his power, even after the return of the inquisition, by entering special bail, to try the cause in the usual manner, before a Court and Jury.

As to the *first point*, the law seems settled, that, after a judgment by default, the Defendant has a right to offer his evidence to the Jury of inquiry to combat the Plaintiff's proofs; and that where the Sheriff refuses to hear the evidence on both sides, the Court will direct a new writ of inquiry.

As to the *second point*, it will be necessary to consider the law of attachments of 1705, and the practice under it, together with the reasons and extent of that practice.

The Legislature, in framing this act, certainly took for their model the custom of *London*, concerning foreign attachments; the principles of the law and mode of proceeding are in many respects conformable to that custom; and the difference appears to be less in the act itself, than in the practice under it. In *London* the proceeding is by plaint against the Defendant, supported by the oath of the Plaintiff. On this is founded the attachment and proceedings against the Garnishee; but no further proceeding is had against the Defendant till he enters special bail, and then a declaration is filed and a trial had in the usual way. The practice under our act is first to obtain judgment against the Defendant, then to file a declaration against him according to the nature of the demand; if *in debt*, the judgment stands for the sum declared for, without even an oath to support it; if *in case*, a writ of inquiry issues for a Jury to ascertain the demand, and then the *scire facias* issues against the Garnishee. No actual notice is given to the Defendant of the execution of the writ of inquiry; his attendance is never expected, and is in most cases impossible.

1788. It seems to be a mode adopted, not for a trial of the merits, but only to conform to the nature of an action on the case, which requires a Jury of inquiry to ascertain the sum for which execution is to issue; and it may be considered as a proceeding to inform the conscience of the Court, in the room of the supposed oath in the action of debt. In its nature it appears to be an *ex parte* proceeding, and not within the reason of the rules in executing writs of inquiry on judgments by default; where the Defendant has regular notice, and has no other opportunity of making a defence.

The attachment law, and all proceedings under it, suppose the Defendant to be an absent person, and *he has, in truth, no day in Court*, till he enters special bail, and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the Garnishee, to disprove the debt, which is done by a *scire facias ad disprobandum debitum;* in either of which cases, he puts the Plaintiff upon the legal proof of his demand, and is admitted to make a full defence. The right of making that defence before the Jury of inquiry has no foundation either in the act or the practice under it.—The law supposes, from his absence, that he is then incapable of making a defence; and, for that reason, has afforded him ample time and opportunity afterwards to do it; nor does it accord with legal ideas, that he should have this opportunity of trying his cause, and also another afterwards upon entering special bail.

It has been said, that notice of executing these writs of inquiry has been usually set up in the Prothonotary's and Sheriff's offices; and that this notice would be vain, if the party might not appear and make his defence. This practice of putting up notices, must have been introduced by the gentlemen of the law *ex majore cautela*. If it were a new case, we should perhaps think it nugatory; as a person abroad cannot be supposed to take notice of a paper put up in the office, which he could never see. However, as it *is* the practice, it is proper it should be continued; and it may, at least, serve the purpose of giving the Garnishee, or the attorney in fact, of the Defendant, an opportunity of knowing, and apprizing his constituent, of the nature of the Plaintiff's demand, that he may be prepared to defend himself against it.

Upon the whole, we are of opinion, that the refusing to admit the Defendant in the attachment to produce his evidence before the Jury of inquiry, is not a sufficient reason for setting aside the inquisition.

Rule discharged.

PENROSE *v.* HART.

ON a rule to shew cause why the Judgment confessed by warrant of attorney in this case should not be opened, *Fisher* stated that several partial payments had been made by the

Defendant, which the Plaintiff had applied first to the discharge of the arrearages of interest; whereas he insisted, that it ought first to have been deducted from the principal debt. 1788.

But, SHIPPEN, *President*, said, that the practice had been otherwise; and he thought with great reason and propriety. He remembered to have heard of an old decision when *Logan* was *Chief Justice*, in which it was expressly settled, that money paid on account of a bond, should first be applied to discharge the interest due at the time of the payment, and the residue, if any, credited towards satisfaction of the principal. By this rule, the gentlemen of the bar had uniformly governed their calculations before the revolution.

Lewis, for the Plaintiff, insisted that the practice was the same at the present day, and appealed to the attornies in Court, who confirmed his assertion.*

ONIEL *v.* CHEW.

FOREIGN Attachment.—The Defendant's interest being attached in a shallop, *Levy*, after filing a positive affidavit of the debt, moved, at the first term, that the shallop might be sold, as a chargeable commodity: And the motion was accordingly granted.

ELLIOT *v.* ELLIOT.

THERE was an agreement filed in this action to refer the matter in dispute to one *Levis;* but in the official rule, by mistake of the clerk, the name inserted was *Lewis*.

After report, *Sergeant* moved to amend the rule by the agreement filed: and leave was accordingly given.

WEAVER *v.* LAWRENCE.

THERE had been a levy upon lands by virtue of a *fi. fa.* issued in this case, returnable to the present term; and now, on *Levy*'s motion, the inquisition, which had been held upon the value of the lands, was quashed.

It then became a question, whether a new *fi. fa.* must be issued; or whether the Sheriff might proceed, after the return of the former writ, to take a new inquisition without further process?

SHIPPEN, *President*.—I cannot perceive any thing in the act of Assembly which precludes the Sheriff from holding an inquest after the return of the *fi. fa.;* and I have always understood it to

* See *ant.* 124.

1788. be the practice to do so. The present inquisition, being quashed for irregularity, becomes a nullity, and leaves the case just as if none had been taken.

PLEASANTS *v.* MENG *et al.*

INDEBITATUS Assumpsit for goods sold and delivered, &c. The Defendants pleaded that they were certificated bankrupts, and that the cause of action arose before the bankruptcy; to which the Plaintiff replied, that the certificate was *unfairly* obtained; and, on the trial of the cause, offered testimony in support of the four following exceptions—to wit:

1. That the debt on which the commission was founded, had been contracted prior to the passing of the act for the regulation of bankrupts; 3 *State Laws*, 644. although a bond had been given for it since the act was passed.

2. That the petition was exhibited by one person, in the name of himself and his partner, without any other than the general authority of the partnership; which is not sufficient for this purpose.

3. That the Defendants were not copartners at the time the commission issued jointly against them. And

4. That two of the Defendants had not committed any act of bankruptcy prior to the issuing of the commission.

The admission of testimony upon these points was opposed by the Council for the Defendants, who contended, that the certificate was conclusive evidence of the debt, trading, bankruptcy, and conformity; and that fraud in obtaining it, or a concealment of effects, were the only matters which the Plaintiff could now be allowed to prove, according to the decisions under the 5 *Geo.* 2. *c.* 30. which statute only differs, on this point, from our act of Assembly, by the use of the word *fraudulent*, instead of *unfairly*; words, however, of synonymous import. 3 *State Laws* 644. *sect.* 24. *Green B. L.* 244. 245. 9. 1 *Stra.* 533. *Co. B. L.* 352. 1 *Atk.* 79. 208. 2 *Wils.* 140. They urged, that any objections to the form of proceeding could only be taken by the bankrupts, who were likewise precluded by their acceptance of a certificate. 2 *Stra.* 746. 5 *Burr.* 2628. *Term. Rep.* 409. and they controverted the power of the Court to unravel, in this way, the decision of the commissioners, whose jurisdiction was competent and conclusive as to all the preceding steps.

The Plaintiff's Council, having premised generally, that where a limited jurisdiction is established, the Courts of common law are bound to prevent any infraction of that limitation; 3 *Black. Com.* 112. 109. and that a Court of limited jurisdiction can never be vested with a right to determine upon the legality of its own acts; *Ibid.* 112. 114. 1 *Bac. Abr.* 563. *Sir T. Ray.* 189. *Salk.* 548. 1 *P. Wm.* 476. *Cowp.* 26. contended, that the *Common Pleas* had a concurrent authority with the *Supreme Court* to restrain the commissioners of bankrupts within the boundaries prescribed by the

act of Assembly; and that if there was no express provision in the act of Parliament in *England*, or in the act of Assembly here, as to the mode of ascertaining a violation of those boundaries, yet, by analogy to other special jurisdictions, the proceedings of the commissioners could not be the proof of their own legality; but, from the nature and reason of the thing, that question must be examinable at another tribunal. 1 *Bac. Abr.* 653. *Lev.* 288. *Cas. temp. Hard.* 186. 145. 2 *Bl. Rep.* 1145. 2 *Wils.* 382.—They remarked, that, 'till the 4 *Ann. c.* 17. *s.* 7. no provision was made as to the manner in which a bankrupt should bring forward his discharge; and that, even under that statute, he was obliged to set forth all the proceedings before the commissioners, which eventually produced the statute of 5 *Geo.* 2. authorizing the Defendant to plead his certificate. This, however, they insisted, only made the certificate *prima facie* evidence; relieving the Defendant from the necessity of stating the petition, trading, &c. in his plea, and obliging the Plaintiff to set forth his exceptions in his replication. See 2 *Ld. Ray.* 1646. *Stra.* 869. *S. C. Co. B. L.* 356. *Doug.* 160.—They then cited many authorities to shew, that since, as well as before, the statute of 5 *Geo.* 2. *c.* 30. and subsequent to the granting the certificate, as well as previously, the debt, trading, act of bankruptcy, &c. had all been controverted and enquired into in the Courts of law, in a variety of forms, between a creditor and the bankrupt, between creditors and the assignees; and, in short, between any persons who were interested. 2 *Stra.* 744. *Cowp.* 509. *Bull.* 37. *Co. B. L.* 307. 314. *Term. Rep.* 409. 573. *n.* 2 *Stra.* 822. 2 *Stra.* 1042. *Barn.* 81. 2 *Bl. Rep.* 725. *Cowp.* 823. *Co. B. L.* 348. 1 *Ld. Ray.* 724. 1 *Bl. Rep.* 70. *Bull.* 40. *Palm.* 325. *Cowp.* 427. 428. 1 *Salk.* 110. *Cowp.* 898. *Bull.* 39. 1 *Atk.* 201. *Co. B. L.* 71. *Cro. E.* 15. 72. *Barn.* 160. 2 *Stra.* 809. 7 *Vin.* 61. *pl.* 14. 1 *Bl. Rep.* 441. *Co. B. L.* 74. *Green. B. L.* 44. 1 *Burr.* 467. 484. &*c.* &*c.*—They added, that to prevent the injustice which, in many cases would happen for want of a Court of Chancery, the Courts here are obliged to deviate from the rigorous rules of the common law, and to adopt the principles of equity. Although in *England* the common law courts cannot enquire into the consideration of a bond, or decree the specific performance of a contract, yet the Courts of Equity will do both; and here, to afford a similar relief, wherever the Chancery would order a deed to be given, our Courts, instead of doing that, presume the deed to have been actually given, and adjudge the case accordingly. Thus, in the present case, the same reasons which would induce the Chancellor to supersede a commission of bankrupts, will induce this Court to consider the commission as virtually superseded. 1788.

SHIPPEN, *President*—This is an action brought by *Samuel Pleasants* against *John Meng*, and three other persons, in which the Defendants have pleaded, that they are certificated bankrupts, and the Plaintiff has replied, that the certificates were unfairly

1788. obtained. If the plea had been drawn up at large, instead of being entered on the docquet, it must have been pursuant to the act of Assembly, "that the cause of action did accrue before "such time as he became a bankrupt;" and the certificate is made by the act only a matter of evidence.

The question now to be decided, is, whether, upon a trial at law, the creditor of a bankrupt may give evidence to controvert the trading, bankruptcy, and conformity? Or, whether the certificate is conclusive proof of all the proceedings before the commissioners? And in this case it is fortunate that the act of Assembly nearly pursues the words of the statute of 5 *Geo.* 2. *c.* 30. for, the analogy of the law must greatly strengthen the application of the authorities, and facilitate the decision of the Court.

The clause, on which the argument arises, is thus expressed, both in the *English* statute, and the act of *Pennsylvania*: "And, "in case such bankrupt shall afterwards be impleaded for any "debt due before he became a bankrupt, such bankrupt shall be "discharged upon common bail, and may plead in general, that "the cause of action did accrue before such time as he became "a bankrupt; *and* the certificate of such bankrupt's conforming "and the allowance thereof, shall be sufficient evidence of the "trading, bankruptcy, commission, and other proceedings pre-"cedent to the obtaining such certificate, *unless the Plaintiff can "prove the said certificate was obtained unfairly*, or make appear "any concealment by such bankrupt to the value of fifteen pounds."

Certain it is that from the 13 *Eliz. c.* 7. (at which time commissioners of bankrupts were appointed in *England*) until the passing of the 5 *Geo.* 2. a period of about 200 years, there is no instance that ever the proceedings of the commissioners, when called for, were not revised and corrected in the Courts of law. By the statute 5 *Geo.* 1. *c.* 24. the bankrupt's certificate might be given in evidence, and was directed to be a full discharge, of any action that should be brought by any creditor of such bankrupt; yet, it appears by the case in 1 *Stra.* 533. that it was still necessary to prove the act of bankruptcy, besides producing the certificate; because the words, *such bankrupt*, related to such person as was described in the statute. Under that statute, therefore, the certificate was so far from being conclusive evidence, that it was not sufficient, without other proof, to shew that he was an object of the act, by being a trader, and having committed an act of bankruptcy.

What then was the alteration introduced by the 5 *Geo.* 2. *c.* 30? It had been found very inconvenient to compel a bankrupt, as often as he was sued, to enter into a proof of all the circumstances which had already been proved before the commissioners: This statute, therefore, enacted, that "the certificate should be *sufficient evidence* of the trading, bankruptcy, commission, &c." and here, *ex vi termini* we must infer that this was not the case before, as the word *sufficient* naturally respects what had been hitherto *insufficient*. The statute, however, does not declare, that

the certificate shall be incontrovertible, or conclusive, evidence, but, in rendering it sufficient evidence of certain facts, which the bankrupt was before under the necessity of establishing by specific proofs, it has merely transferred the burthen from him to the creditor, with whom it now lies to prove, according to the terms of our act of assembly, that the certificate was *unfairly* obtained. 1788.

That the certificate was *unfairly* obtained, is, indeed, an expression attended with some ambiguity; but it must have respect to the subject matter, which was the trading, bankruptcy, commission, &c. And, if a man had not been a trader, or, if he had not committed an act of bankruptcy, it was *unfair* to grant him a certificate:—So that *unfair* is tantamount to *illegal;* holding equally with the converse of the proposition, that a certificate *illegally* must be *unfairly*, obtained.

If the Parliament of *England* intended to make so essential a change in the bankrupt system, as to leave the proceedings of the commissioners without control, or appeal, it would be strange that no stronger, no clearer expression, was employed for that purpose; and, if such was indeed their sense, it must appear still more strange, that the Courts of law have been so far from understanding it, that in every case since the passing of the statute, they have permitted the same investigation which was before allowed. In *Cowp.* 823. it appears, that a bankrupt, having obtained a certificate under a *second* commission pending a former one, under which a certificate had been refused, an application was made for an *Exoneretur* to be entered on the bail-piece; but the Judges pronounced the second commission to be absolutely void, and discharged the rule to shew cause. Now, if the certificate were conclusive, this decision was illegal; for, the certificate is as much evidence of the commission, as of the trading and bankruptcy; and its validity was a question equally before the commissioners, whose sanction it had received.

It is clear, therefore, in every view, from the words of the law, and from judicial interpretations of its meaning, that the Legislature has only made the certificate *evidence;* and the nature of evidence necessarily implies an adverse right to controvert and repel. A foreign judgment is allowed to be *prima facie* evidence of a debt, and yet it was adjudged to be open to examination; for, as I have already hinted, although some kinds of evidence are stronger than other kinds, yet, in that respect, they are all placed on the same footing. *Doug.* 1.

But there is a general consideration, independent of the act of Assembly and the authorities; which is, that the matters determined by the commissioners are certainly matters of law, arising from the facts; as, what avocation constitutes a trader, or what conduct amounts to an act of bankruptcy: Would it not then be a strained and unreasonable thing to suppose, that the Legislature has established a jurisdiction of this sort, competent to decide questions of the greatest magnitude in their operation, and yet,

1788. that there should be no appeal to examine its proceedings, no power to correct its errors!—We are happy, indeed, in knowing that our decisions, if erroneous, may be rectified in the *Supreme Court*; the adjudications of which are also liable to the ultimate scrutiny of the *High Court of Errors and Appeals*. And, I repeat, is it not absurd, therefore, to imagine that the limited jurisdiction of the commissioners of bankrupts is alone exempted from control; or, that men, unskilled in jurisprudence, however upright in their general conduct, and intelligent in their particular arts and professions, should enjoy an absolute authority in the discussion and determination of every nice point of law, which is incident to the extensive and intricate investigations of the bankrupt system?

For these reasons, THE COURT are unanimously of opinion, that the evidence offered by the Plaintiff, ought to be received.

The case, upon the evidence, appeared to be this:—The Defendants, *John Meng*, *William Goodwin*, *James Smith*, and *Robert Cumming*, had been co-partners in trade under the firm of *John Meng and Co.* On the 26th of *April* 1785, *Goodwin* alone, in the name of himself and his partners, executed an assignment of all their *personal* property to *Curtis Clay et al.* in trust for the benefit of the partnership creditors: And, on the 30th of the same month, he executed another assignment, in the same form, and for the same use, of all the *real* estate of the company. On the 25th of *June* following, a third assignment was executed by *Meng*, *Goodwin*, and *Cummings*, of all the real and personal estate of the partners to trustees, for the same use; at which time the Defendants were indebted to the Plaintiff (among others) and to Messrs. *Rose* and *Dickens* (who afterwards became the petitioning creditors) to a considerable amount. After these transactions, about the beginning of *July* 1786, *Meng* opened a store in *Philadelphia* under the old firm of *John Meng and Co.* in which, however, the messenger of the commissioners only found a small quantity of soap, and a bundle of paper money; but *Cummings* was gone to *Georgia* to collect debts under the direction of the assignees, and *Goodwin* and *Smith* resided and kept a store at *Cooper*'s *Ferry*, in *New-Jersey*. On the 1st of *August* 1786, a joint commission of bankrupts against all the four partners as traders by retail, issued upon the petition of *Rose*, who alone subscribed it in behalf of himself and his partner *Dickens*, having previously sworn that *John Meng and Co.* were indebted to them on a bond bearing date the 8th of *July* 1786, payable on the 15th of the same month; which bond, it was admitted, had been given for the precedent debt due at the time of the assignment of the 25th *June* 1785. It was also agreed that *Meng* and *Cummings*

had committed acts of bankruptcy; and, with respect to the other two partners, it appeared from the minutes of the commissioners of bankrupts, that the Sheriff's officer, having a *Ca. Sa.* against all four at the suit of *Rose* and *Dickens*, had made enquiries for *Smith* and *Goodwin* at the place where *Meng* kept his store in *Philadelphia*, and at the *Ferry-house* from which they usually crossed to *New-Jersey*, but could not find them; that they had requested the Ferry-man to keep a boat in readiness for them, for fear of a writ being issued against them; that the Ferry-man, observing the approach of the Sheriff's officer, gave them notice; that thereupon they concealed themselves in the *Ferry-house*, saying that they did not like to go to gaol, but would be able to pay all their debts; and that soon afterwards they crossed the river to elude the pursuit of the officer. 1788.

On these facts, the Plaintiff's Council contended,—1st, That the debt of the petitioning creditor was not within the bankrupt law, which provides, that the debt, on which the commission issues, "shall have arisen upon a contract or transaction subsequent to the passing of the act." 3 *State Laws* 644. *sect.* 3. But here the bond could be given for no other purpose than to make the Defendants bankrupts; and, although it may extinguish, it cannot change the original nature of the debt. The doctrine of extinguishment at common law, is, indeed, more limited than the adverse Council will admit; for, although a security of a superior nature will alter the remedy, the debt itself remains. 6 *Co.* 44. *T. Rep.* 17. *Barn.* 81. 2 *Stra.* 1042. *Cases Temp. Hard.* 267. And the doctrine which applies in the last case to support the commission there, applies to prove the invalidity of the one at present in controversy. Besides, an act between obligor and obligee, that tends to the injury of other persons, the law deems a fraud, by which, so far, at least, it is vitiated and annulled. 1 *Burr.* 474. 3 *Co.* 80. The bond of the petitioning creditor therefore, taken in every point of view, was insufficient to found a commission; for, whether it was given without a consideration or in consideration of a precedent debt, it is equally contrary to the act; and, if it is regarded as a fraudulent collusion between the petitioning creditor and the bankrupts, although it may be obligatory upon them, it is void as to a third person.—See *Term Rep.* 406. *Doug.* 282.

2. The petition and affidavit of *Rose* alone, notwithstanding it is said to be on behalf of himself and his partner *Dickens*, was also irregular and illegal. There are, perhaps, no express decisions on this point; but, upon general principles, he who acts for another must shew his authority; and, in the case of partners, for a purpose of this nature, all must subscribe the petition, or delegate an express power to another for doing it in their name; a point already determined in this Court, in the case of *Gerard* v. *Basse et al. ant.* 119. This is not an act that can be in contemplation in the business of a partnership; and the reason is the

1788. stronger against allowing it, as a bond must be given by the petitioning creditor. 3 *State Laws*, 644. *sect.* 3.

3. But the commission itself had issued erroneously and illegally; for the Defendants were not partners at the time it issued; and a joint commission can only issue against partners. The assignment of the 25th of *June* 1785, divested all their partnership stock, and, consequently, dissolved their joint connection; for, partnerships may be dissolved by tokens, &c. or, they necessarily cease with the objects of their institution. 1 *Domat. lib.* 1. *tit.* 8. *par.* 10. 11. *sect.* 5. *pa.* 155. But, although there was no formal dissolution of the partnership, it is clear that the second trading was merely colourable, for the purposes of a bankruptcy; and they are described to be traders by retail, which cannot relate to their former general partnership, but to the recent colourable trading. To carry on business after a man's effects are gone, is, in itself, a fraud. *Co. B. L.* 80. 81. 82. 1 *Burr.* 478. 2 *Black. Rep* 996. 362.*

4. In a joint commission, all the parties must have committed acts of bankruptcy, *Co. B. L.* 4. 1 *Atk.* 97. The certificate, therefore, can be of no avail, at least, as to *Goodwin* and *Smith*, who never committed acts of bankruptcy. In crossing the river, although they said it was to avoid an arrest, they were only returning to their home; and absconding, in order to constitute an act of bankruptcy, must be from the usual place of abode, where the party does business; which, in the present case, was in *New Jersey*, whither they retreated, and not in *Pennsylvania*, where the writ issued. In *Co. B. L.* 71. it is said, that, if a man flies from the State to which he belongs, this is an act of bankruptcy: but here the parties did not fly from, but to, their State, or home; and a denial, or keeping house, to bring a man within the act, must be at his own place of residence, not at the residence of another person. *Ibid.* 74. Nor can an act be made an act of bankruptcy by analogy; it must be such as is within the law; and there is no case where a stranger, in another State, has been deemed a bankrupt for returning to his home, in order to avoid an arrest where, probably, he could not obtain bail; or for a temporary concealment in another's house for the same reason.

The Council for the Defendant stated, that, if the present objections were successful, they would be equally fatal to almost every other certificate which had been granted under the act of Assembly; for, nine out of ten of the commissions of bankrupts had originated in the same manner, upon debts either revived by new securities, or created in concert for the occasion. They then contended—1. That the original simple contract debt was merged in the bond, 6 *Co.* 44. that if both parties agree to bring the debt in this shape within the act, the proviso in the *third sect.* is satisfied; and that the bond was not taken after the bankruptcy, which distinguishes this from the case in *Rep. Temp. Hard.* 267.

2. That, on the second point, the act of one partner is the act of all in commercial matters; that one partner may bring a suit

* See *Pothier*, per le Contrat de Societé, p. 135.

at law for the joint debt, or hold the Defendant to bail upon his sole affidavit; and that the case of *Gerard* v. *Basse et al.* does not apply, as it did not turn upon a commercial transaction, but upon an instrument under seal, which can only bind the person that executes it. 1788.

3. That there was no dissolution of the partnership between the Defendants; that the store kept by *Meng* in *Philadelphia*, was evidently, from the testimony, a continuance of the old connection; and that the amount of the joint stock, whether large or small, could not affect the question. See 1 *T. Jones.* 141.

4. That all the Defendants were enquired for where they carried on their trade, at *Meng*'s house; that *Smith* and *Goodwin* denied and concealed themselves at the *Ferry-house*, and expressly said, that they were going off to avoid the arrest; that an absconding out of the State, equally affects a stranger and an inhabitant; and that even a departure, with an intent to delay a creditor, is a sufficient act of bankruptcy. See 2 *Stra.* 809. *Palm.* 125. *Co. B. L.* 74. *

The PRESIDENT, having again noticed the cause of action, and the state of the pleadings, proceeded in delivering the following charge to the Jury:

SHIPPEN, *President.*—A bankrupt law, in a trading country, must be productive of many benevolent and beneficial consequences. When an unfortunate trader has fairly and honestly surrendered all his property for the use of his creditors, the Legislature certainly intended, that he should be effectually discharged from all his debts, and left at liberty to acquire new substance: and there are many instances in *England*, where, by this encouragement, bankrupts have been enabled, not only to extricate themselves and their families from the calamities that oppressed them, but to indulge an honourable disposition in paying those obligations, from which they were thus, by law, exonerated.

It has often happened, however, that, on the other hand, the bankrupt acts have been perverted to the iniquitous purposes of fraud and embezzlement; and, therefore, it is requisite, that, on every occasion, the strictest scrutiny should take place. With this view, our act of Assembly, corresponding with the *English* statute, directs commissioners to be appointed, who, having received the necessary proofs of the party's being a trader, and of the commission of an act of bankruptcy, are amply empowered to investigate the bankrupt's conduct, and to compel a disclosure and surrender of all his property; and, when that is satisfactorily done, they are authorized and required to grant him a certificate of his conformity to the law. In *England*, this certificate, (which, when fairly obtained, is a complete discharge and release from

* My absence from Court during a great part of the defence, unfortunately prevents my stating it more at large. What is here published is principally taken from the arguments of Mr. *Fisher*.

1788.

all the former debts of the bankrupt) cannot be granted without the consent of four fifths in value of the creditors; but, in *Pennsylvania*, the granting it rests entirely with the commissioners; and there is no check upon its operation, but that it must be first allowed by the President of the Supreme Executive Council, under the great Seal of the Commonwealth.

In the case under consideration, the commissioners have granted, and the President has allowed, a certificate in favour of the Defendants; but four exceptions have been taken to the proceedings on which the certificate is founded, in order to maintain the Plaintiff's action, which is brought for the recovery of a debt contracted before the act of bankruptcy. The Court being of opinion that the evidence in support of these exceptions ought to be submitted to the Jury, it now only remains to consider, whether the exceptions themselves are sufficient, in law, to defeat the benefit which the Defendants claim from the certificate.

1. In the *first* place, it is said, that the debt of the petitioning creditors, was not such as warranted the issuing of the commission; for, it was contracted before the act of Assembly for the regulation of bankruptcy, although a bond of a subsequent date was given for it: And the Plaintiff's Council have contended, that this relation between the bond and the former debt is sufficient to take the case out of the act. On the part of the Defendants, however, it is insisted, that the original debt was extinguished by the bond, which they allege, is the creation of a new debt, so as to satisfy the proviso in the 3 *sect.* of the law.

The general doctrine of extinguishment is, at this day, well settled and understood. If a creditor upon a promissory note, or book account, accepts a bond for the amount from his debtor, this, being a security of a higher nature, extinguishes the first debt, and the creditor cannot afterwards sue upon the note, or account, but must proceed for the recovery of his money upon the bond alone.

There is, however, no authority precisely in point to the question now agitated; but the determination in *Cases Temp. Hard.* 267. is thought by the Plaintiff's Council to be in a great degree analogous. On that occasion a bond had been taken after an act of bankruptcy, (of which the obligee had no notice) for a simple contract debt due before, and as any debt that accrues after an act of bankruptcy is not entitled to a dividend, the Chancellor there considered the debt as it originally stood, in order to give the benefit of it to a creditor, who would otherwise have been excluded, without any default on his part, from a distributive share of the bankrupt's effects. This case, therefore, it is objected by the Defendant's Council, must have depended upon the peculiar circumstances in which it was involved; and that this appears the more evidently, as Lord *Hardwicke* expressly says, that, between the parties themselves, the bond would operate as an extinguishment of the precedent debt. There can be no doubt, indeed, that many of the cases on this subject have been determined by the particular circumstances that attended them; for, we find,

that a transaction of a similar nature with that just cited, but presented in a different point of view, was decided directly the other way. *Term Rep.* 705. A bankrupt, after an act of bankruptcy committed, had given a bond with warrant to confess judgment to one of his creditors for a debt due before the act of bankruptcy; the judgment was entered and a *Ca. Sa.* issued. Afterwards the bankrupt obtained his certificate, and moved to be discharged from this execution, alleging that the cause of action arose prior to the act of bankruptcy; but the Court in this case decided, that the bond was an extinguishment of the old debt, and, accordingly, denied the motion. 1788.

But there are many reasons which might be urged to distinguish the present case from that determined by Lord *Hardwicke*. When the bond was given by the Defendants to *Rose* and *Dickens*, no act of bankruptcy had been committed; no dividend was to be claimed; no persons, but the parties themselves, were interested; and, as nothing appears to preclude the idea that this was a voluntary exchange of securities, certain it is, that after the acceptance of the bond, *Rose* and *Dickens* could never have recovered upon the original debt. In all these respects, therefore, there is a material difference between the authority cited, and the case in controversy;—a difference which seems strongly to support the argument of the Defendant's Council, that the bond was an extinguishment of the preceding debt.

Even, however, if the law is doubtful, from the frequency of the practice of entering into voluntary bonds, for the very purpose of obtaining a commission, I should be unwilling to recommend it to the Jury, on that ground alone, to invalidate the certificate: And, therefore, as we have indeed no positive rule to guide us, but the whole rests on an implication arising from the cases, the Jury must decide for themselves. I will only add on this objection, that the Legislature probably introduced the proviso in the third section (with, I presume, a view particularly to foreigners) in order to evince, that it was not intended to abrogate all former contracts and obligations: And, as it is only the debt of the petitioning creditor that must be subsequent to the passing of the act (for, the commission having issued, all debts prior, as well as subsequent, are included) no great mischief can ensue from this restriction, or from the method which has been generally taken to bring the debt of the petitioning creditor within the words of the law.

2. The *second* objection is, that a petition subscribed by one of two partners, in the name of himself and partner, is not a legal ground for issuing a commission; and this is said to be supported by a decision of this Court, in the case of *Gerard* v. *Basse et al.* (*ante.* 119.) There can be no doubt of the legality of that decision. A bond is technically termed a deed; and the doctrine with respect to the efficacy of a deed, stands upon its own footing; none being bound by it, but the persons who actually execute it. In commercial matters, however, the act of one partner

1788. is the act of both; and, therefore, it is necessary to consider, whether the petition of a creditor to obtain a commission, is most like a deed, or a commercial act. It appears to me, indeed, to bear a strong resemblance to an action at law; and as one partner may institute a suit, and the oath of one will be sufficient to establish the debt on a question of bail, I cannot conceive any satisfactory reason, why more should be required for the purposes of the bankrupt law: and, therefore, in my opinion, this objection ought not to weigh with the Jury.

3. The *third* objection argues, that the partnership that subsisted between the Defendants, had been virtually dissolved by the general assignment of their property; and that, therefore, a joint commission could not issue against them. I have not had time to examine the authorities upon this point, but, I believe, the doctrine to be well founded, that there must be a subsisting partnership at the time a joint commission is taken out, and it seems also reasonable, to infer the dissolution of a partnership from an act, by which all its objects are alienated and transferred. The barely executing an assignment, however, of the stock in trade, if the joint transactions are not at an end, will not be an actual dissolution of the partnership; for, where there is no express agreement to make that dissolution, the assignment can only be considered as circumstantial evidence of it, which the Defendant is at liberty to repel by contrary proof.

Whether, therefore, the trading subsequent to the general assignment was fictitious, and merely for the purposes of a bankruptcy, as the Plaintiff contends; or, whether it was a continuance of the former copartnership, as the Defendants allege, must depend upon the facts, on which it is the province of the Jury to decide. If they should think that the old partnership was dissolved, and no new one contracted, then there was not any legal origin for the joint commission;—to found a commission upon a fictitious partnership being certainly *unfair*. But, if, on the other hand, there was really a partnership between the Defendants at the time of their bankruptcy, neither the previous assignment of their effects, nor the smallness of the quantity of goods in their store (a matter only to be considered as circumstantial evidence of a fictitious trading) can have any effect upon the case to invalidate the commission, or to defeat the certificate.

4. The *fourth* objection is, that two of the Defendants, *Goodwin* and *Smith*, have not committed acts of bankruptcy; and, therefore, it is argued, that the verdict of the Jury must, at least, be against them. As these persons resided in *New Jersey*, it is said, in support of this objection, that *Meng*'s store, or the *Ferry-house*, (at both which they were denied, and at the last place they concealed themselves from the Sheriff's officer) cannot be deemed their home, so as to satisfy the words of the act, in describing an act of bankruptcy, by "beginning to keep house;" of which the usual proof is certainly, a demand and denial. Under

the decisions in *England* (and our law is subject to the same construction) a person who resides in a foreign country, trades to that kingdom, and afterwards goes thither, is clearly within the statute. It is true, that, considering the mere phrase, it seems absurd to say, that a man keeps his house, who has, in fact, no house to keep, and yet there is a case expressly to that point, where a man, having no home of his own, was held to have committed an act of bankruptcy by keeping house in the dwelling of another. 1788.

But the Defendants Council have controverted this objection upon the ground of a departure out of the State; which, they say, applies as well to a stranger as an inhabitant; while, in behalf of the Plaintiff, it is contended, that, as the only proof of a departure by *Goodwin* and *Smith*, is that of going to their own house in *New Jersey*, this cannot, upon principle or precedent be construed into an act of bankruptcy. From the evidence, it appears, that a writ had issued against the four Defendants, of which all of them had notice; two of them, it is agreed, committed acts of bankruptcy, and the other two, being enquired for at the store of *Meng*, and also at the *Ferry-house*, where they had ordered a boat to be ready, for the express purpose of avoiding an arrest, did actually quit the State upon hearing that the Sheriff's officer was in pursuit of them. This conduct, in the common cases of a redent, would, undoubtedly, amount to an act of bankruptcy; for, it has often been determined, that, if a man goes from home but a day, in order to delay or defraud his creditor, it is sufficient to bring him within the statute. Whether, however, the flight of a stranger to his own home in another State, is such a departure as the law intends, the cases have left in great obscurity; for the only principle ascertained by them, is that the departure must be with a view to delay or defraud; and the act of Parliament itself contains no distinction of the nature now contended for. On so doubtful a point, therefore, the Court would rather, at this time, leave the decision at large to the Jury, than venture a positive opinion.

Such then are the objections on which the Plaintiff insists that his action is maintainable; and, if, upon the whole, the Jury think he has proved (as it is incumbent upon him to do) that the certificate has been *unfairly* obtained; either because the commission ought not to have issued, or that the certificate ought not to have been granted, their verdict must be in his favour. But, if, on the contrary, there has been no illegal or unfair methods pursued by the Defendants to obtain their certificate, they are discharged from the Plaintiff's demand, and the verdict must be for them.

After staying out some time, the Jury returned to the bar, and declared that they could not agree in a verdict; whereupon they were dismissed by consent of the parties, and a *Venire Facias de novo* awarded.*

* I have been informed by Mr. *Ingersoll*, one of the Plaintiff's Council, that his Client, acting on this occasion upon motives of public spirit, was satisfied with having obtained the opinion of the Court in favour of the right to investigate the proceedings before the commissioners of bankrupts, &c upon a trial at law; and that, therefore, probably, this action would never be prosecuted further.

The Council were *Ingersoll* and *Rawle*, for the Plaintiff;---*Lewis*, *Wilcocks* and *Fisher*, for the Defendant.

1788.

FARREL *v.* M'CLEA.

THIS was an action brought by the Plaintiff to recover his wages as mate of a vessel, of which the Defendant was master, and one *Sadlier* was the owner. On the trial, it appeared, that the Defendant, having cited the Plaintiff to shew his cause of action, acknowledged before the Judge at his chambers, that he was captain of the vessel during the time for which the wages were claimed; but then he insisted, that he had never engaged the Plaintiff, who, as he said, was shipped on a contract with the owner. To prove the time of service, the following certificate, subscribed by the Defendant was read:—"*Philadelphia*, 12th *Ja-*" *nuary*, 1787. These are to certify to whom it may concern, that " *Joshua Farrel* was mate on board the from the 16th " *June* to the 16th *August*, 1786, making two months. Given " under my hand, *Robert M'Clea*.—*N. B.* At the wages of twenty " dollars *per* month, as *per* Mr. *Sadlier*'s agreement."

Levy, for the Defendant, insisted, that the case, depending entirely on the confession of the party, the whole of it must be taken together; *Newman* v. *Bradley*, ant. 240. that then it would appear, as well from the certificate, as from the acknowledgment before the Judge, that the Plaintiff had been employed by the owner of the vessel, and not by the captain; and, consequently, that the owner and not the captain was liable for the wages. He admitted, that where a captain shipped a sailor, or ordered repairs, he was responsible; but he contended, that there must be a shipment by the captain to charge him on the general principle; *Doug.* 99. 100. and that where the captain, or the owner, undertakes by an *assumpsit*, either express or implied, the other is discharged. 2 *Stra.* 816. He endeavoured also to establish a distinction between a mate and the common mariners, the mate being, he observed, a middle character between the seamen and the captain; and thence, he argued, that, like the captain, he was not entitled to the advantages which the maritime law provides for the seamen. 12 *Mod.* 440.

Moylan, for the Plaintiff, stated, that mariners had a threefold security for their wages:—1st, They may proceed against the owners; 2dly, They may libel the vessel; or, 3dly, They may sue the captain. He said, that the captain was not bound to receive any sailors shipped by the owners; because he was not only liable to the owners, but to strangers, for any wrong that they might do when shipped; but, he contended, that, if the captain did receive them, he made himself liable for their wages; 12 *Mod.* 434. and he answered the authorities cited for the Defendant, by shewing, that they were cases of repairs where workmen were employed by the owners, and could not be rejected or dismissed by the captain; nor was he answerable for their conduct. That the contract was, in fact, made by the owner, he observed, rested entirely on the testimony of the Defendant; and he urged

the necessity of great caution in admitting the allegations of a man in his own favour. *Doug.* 751. 753. Receiving them, however, in their fullest extent on this occasion, they only proved that the owner had assisted in procuring the mate to embark, and this could never defeat the triple right with which the law had armed him. 1788.

SHIPPEN, *President*, in delivering the charge of the Court, adverted to the nature of the evidence on which the case was established, and instructed the Jury to take the whole together, unless they should think, that there were circumstances in the Defendant's confession, which rendered the part in his own favour inconsistent or improbable.

But, even admitting the fact, that the Plaintiff had been shipped by the owner, his honour stated, that the captain was liable; for, the law gave the Plaintiff a threefold remedy to recover his wages; and, unless by some positive act, or word, he had released (as he might do) one of those remedies, a mere compliance with the solicitation of the owner to embark, cannot defeat them. He said there was no distinction, in this respect, between the mate and a common mariner; they were alike subject to the orders of the captain, who could equally refuse to receive either, or, when received, was equally empowered to dismiss them; for, his appointment as captain gave him the sole, undoubted, and exclusive right of choosing every seaman under him, whatever courtesy he might be inclined to shew to the recommendation of those by whom he was himself employed.

With regard to the case of repairs, the PRESIDENT observed, that it was not strictly analogous to that of seamen's wages, but stood on this footing:—If a vessel is in port, where the owners reside, and they, without the interposition of the captain, employ carpenters, &c. to repair her, the captain is not liable; not merely because he does not employ them, but, because he is not answerable for their conduct when employed. But if a vessel is repaired in a foreign port, then, indeed, a similitude arises between the cases, and the captain is as liable for those repairs, as for the wages of his sailors, because the workmen, as well as the sailors, are, in the latter instance, employed by him, and equally subject to his control and dismission.

The opinion of the Court was conclusively, that, if the mate had served on board the vessel, the captain's having admitted him to do so, rendered him liable for the payment of the wages.

And the Jury, accordingly, found a verdict for the Plaintiff.

CAMP *v.* LOCKWOOD.

THE Plaintiff and Defendant had both been inhabitants of *Connecticut* previous to the revolution, when the debt, for which this action is brought, was alleged to be contracted, and

1788. continued so for some time after the commencement of the war. Subsequent, however, to the declaration of independence, the Plaintiff joined the *British* army, and, on the return of peace, he removed with other loyalists to *Halifax*, where he continues to reside. On the second Thursday of *May* in the year 1778, the Legislature of *Connecticut* enacted a law declaring that all the estate, real and personal of any person or persons who had joined the enemies of the *United States*, or had assisted them, or should thereafter do so, should be confiscated; and that, with respect to those persons who had been inhabitants of the State (the last section of the act providing for the case of persons who had never been inhabitants) the County Court upon application was empowered and directed to give judgment, that all their estate should be forfeited to the Commonwealth, and thereupon to appoint administrators (as in the case of intestates) who were to sell such confiscated estate, institute suits, recover and pay debts, and to deliver the surplus, if any, into the treasury of the State, &c. In *September* 1779, the Plaintiff was proceeded against under this law, as one who had been lately a resident of the town of *New-Haven;* and, it being duly adjudged that he was guilty of joining the enemies of the *United States*, his estate was declared to be forfeited for the use of the State of *Connecticut*, and certain parts of it were seized and sold; but no steps were taken to recover from the Defendant the debt said to be due from him to the Plaintiff, although the Defendant at the time of the confiscation, and for some time afterwards, remained an inhabitant of *Connecticut*, and has always had property there, liable to legal process.

Under these circumstances, *Camp* instituted this suit; in bar of which *Lockwood* pleaded, that the confiscation, by virtue of the act of *Connecticut*, had divested the Plaintiff's property in the debt, if any was due, and vested the same in that State: And to the efficacy of this plea the present argument was confined, upon a demurrer and joinder in demurrer.

The point was first opened on the 16th of *August*, 1788, and finally argued by *Ingersoll*, for the Defendant, and *Rawle* for the Plaintiff, on the 21st of *November* following.

Ingersoll. The forfeiture of an enemy's estate, moveable or immoveable, and of his rights, corporeal or incorporeal, is a matter of strict sovereignty, although, by the courtesy of nations, debts are allowed to revive at the conclusion of a war. *Lee on Capt.* 111. The Plaintiff, however, comes not within the rule respecting an enemy, but having been proceeded against as a delinquent subject, he must be considered as an attainted traitor; and, by such attainder, all his estate, real and personal, were absolutely and irrecoverably forfeited. 3 *Bac. Abr.* 755. And a forfeiture of real and personal estate extends to things in action as well as in possession. 2 *Bac. Abr.* 577. in which general point of view the law of *Pennsylvania* has also expressly regarded the subject. 2 *State Laws* 99. The act of *Connecticut* is as clear and comprehensive as words can make it, considering the party as actually dead, and

appointing administrations of his estate. Nor can the provisions contained in the treaty of peace affect the question; for, the treaty does not operate like the reversal of an outlawry, but like a pardon. 22 *Vin. tit. Outlawry.* 1788.

Rawle contended, that, whether the question was considered, 1st, upon pleadings here; or, 2dly, upon a supposition that the suit had been instituted in *Connecticut*, the Plaintiff was not barred of his recovery.

1. Arguing the case on the pleadings here, he premised, that it was a general principle, that nations, with respect to each other, must be considered as individuals in a state of nature. *Puff. lib.* 2. *c.* 3. *sect.* 23. 1 *Vat.* 4. 5. *Burlam.* 195. Moral entities, or persons, are given to them, in order to render them subjects of actions; but, as to what relates to a nation itself, or the property which it has acquired, there is no power that can direct or restrain its conduct. In a state of society private property yields to the general good; but this is not the case in a state of nature; and, therefore, it may be taken as an axiom, that where the act of a particular nation vests in itself the property of an individual, whether a subject or not, the right, thus acquired, extends no further than the jurisdiction of that nation, and the act on which it is founded can have no extra-territorial force. 1 *Vat.* 145. This principle has, indeed, been recognized by the practice of the *United States*. For, there is no instance of the agents for forfeited estates passing from one State into another; but, on the contrary, acts of attainder have always been passed against the same person in the several States where his property was found; which would not, surely, have been necessary, if, either on general law, or under the articles of confederation, the act of one State, appropriating private property to its own use, had any effect beyond the limits of its own jurisdiction. If then the State which has passed the law of confiscation, has forborne to reduce the Defendants debt into possession, and the State where the debtor resides has no power to do so, it necessarily follows, that the debt, remaining on its original footing, is liable to the Plaintiff's demand. When, indeed, the act of *Connecticut* was passed, the Defendant resided in that State; but when this suit was instituted he had removed hither; and the law is clear, that the debt follows the person in every instance, except that of a distribution in the case of intestacy. *Carth.* 373.

2. Considering the point, in the second place, upon a supposition that the action had been brought in *Connecticut*, the question arises, whether a right not reduced into possession within due time, can afterwards be recovered? If the administrators had recovered from the Defendant, it would certainly have been sufficient to bar the Plaintiff's claim; but, when the State allowed the debtor to remove from its jurisdiction, an implied power was given to the creditor to pursue him elsewhere. Should a husband neglect during his life time to recover *choses in action* belonging to his wife, she is entitled to them afterwards, and not his executors or administrators; for, the law will never favour negligence. The

1788. reasoning in this case will apply as well with respect to nations as individuals. *Lee on Capt.* 119. Besides, a right vested for a particular purpose, ceases with that purpose: The war being at an end, the object of confiscating the Plaintiff's debts, &c. is also extinguished; and if the administrators could not recover the debt in *Connecticut*, nor, *a fortiori*, in *Pennsylvania*, by the rules of natural justice, *Camp* may recover it; for, there can be no plausible reason why *Lockwood* should be exonerated. Under the treaty of peace, indeed, and the law of *Connecticut* (passed the 2d Thursday of *May*, 1787) repealing all acts repugnant to the treaty, the administrators could not now interfere to prevent the Plaintiff's recovery; for, the act by virtue of which they were appointed, is certainly of that description;—so that by the 4th article *Lockwood* is estopped from saying that he will pay the debt to the administrators; and, by the 6th article, they are precluded from compelling him to do so. This exposition has also prevailed in *England;* for, the agents on the claims of the loyalists make no allowance for outstanding debts; because, as it has been already observed, they may be recovered under the treaty.

Rawle then proceeded to consider, particularly, the objections offered by the Defendant's Council, in support of his plea; which were, he stated, 1st. That the Plaintiff was not an enemy, but a rebellious subject; 2dly. That by the act of *Connecticut*, and the proceedings under it, he was attainted, and considered as actually dead; and 3dly. That he was not entitled to any benefit under the treaty of peace.

1. To the *first* objection, he answered, that the proceedings were expressly against *Camp* as an enemy; that it was by reason of his adherence to the enemies of the *United States*, and of actions not merely criminal as they relate to his duty to the State, but to a foreign nation at war with the State, that the forfeiture had been effected; and that the law of *Connecticut* neither knew, nor indicated, a distinction between the inimical character of a subject and a foreigner. But, he urged, that, as against a delinquent citizen, merely in relation to the State of which he was a member, not an enemy in the strict sense of the word, the act of the State, *non valet extra territorium;* that, therefore, it could never be any bar to *Camp*'s recovery in *Pennsylvania;* and that, even in *Connecticut*, he would now be entitled by the treaty of peace, and the law passed there in support of it, to recover all the property not actually vested and in possession of the State. If, on the other hand, he was proceeded against as an offending subject, in relation to his adherence to a foreign power, the general principles entitle him to recover after the war has ceased. But, in either point of view, the allowance of the present plea would contravene the established principles in the cases enumerated by *Vattel*, 1 *Vol. p.* 4. *sect.* 13. 14. *p.* 121. *sect.* 2. 3. *p.* 129. *sect.* 25.

Besides, his offences as a subject, though committed against a nation confederated and allied with our's, do not allow us to

join in the infliction of punishment. 1 *Vat.* 98. *sect.* 232. We cannot, therefore, make ourselves parties to the public severities of *Connecticut*, nor interfere in the relation and conflict, between that State and its subjects: And, as no public proceedings have taken place against the Plaintiff here, there is not any authority for denominating him an offender against *Pennsylvania*. The only instance in which these general principles have sustained an alteration by the articles of confederation, is confined to the *persons* of offenders; and *expressio unius est exclusio alterius*. 1788.

But the admission of this plea would be attended with consequences so inconvenient, that the mere argument *ab inconvenienti* ought to prevent it. In whatever shape it is claimed, it would interfere with the axiom, that one nation cannot intermeddle with the government of another. *Vatt. p.* 138. *sect.* 54. If the Plaintiff was attainted, or in debt, here, his property could not be forfeited or attached, since, by the adverse argument, it belongs to *Connecticut:* Nay, if he came hither with a view to settle, he could not act, trade, or become a useful citizen on the funds he found here. Thus a *collisio legum* would arise; the universal rule of which, is, that the laws and the interest of the State having jurisdiction of the cause, shall be preferred. 2 *Hub.* 26. 3 *axiom.*

2. To the *second* objection he answered, that it was not founded in the truth of the case. *Names* ought not to mislead us; for although his property in *Connecticut* had been confiscated, and an administrator appointed to collect it; yet nothing appears to prove that the Plaintiff is not still alive to every legal purpose there, as well as here; independent too of the treaty of peace.

3. But, in answer to the *third* objection, he insisted, that the treaty of peace removes not only the personal disability, if any such there was, but also the particular bar. Whether, indeed, it operates as a general reversal, or a general pardon, may be questionable; although the former is the more probable conjecture, since the provision made in favour of recovering property sold as confiscated, would have been needless if it was only considered in the light of a pardon. But, admitting it to be only a pardon, and that it has no effect against *bona fide* purchasers, he contended, that it was conclusively in favour of the Plaintiff on the point of restitution, as against the State; and, *a fortiori*, in a case where his credits had not been reduced into possession. The fair construction of the treaty necessarily warrants this doctrine.

Ingersoll, in reply.—There are a variety of instances in which this question will be agitated, if the Plaintiff should now prevail; and the purses of individuals, as well as the coffers of the State, will be deeply affected by the decision. It must be remarked that neither the Defendant, nor *Connecticut*, ask the interposition of this Court, but the person who was the object of the law of that State; that the Defendant does not intercept the money in its course to the public treasury; but prevents its being remitted to *Nova-Scotia;* and that the contest, in fact, lies between an individual and a sister State.

1788. He observed, that he did not controvert the general doctrine advanced by the opposite Council, that the law of nations is the law of nature applied to nations, and that one sovereign power cannot be bound by another; but he distinguished between the necessary, and the voluntary law of nations, which arises *ex comitate*. *Vatt. pref.* 12. *Ibid. p.* 6. and insisted that the laws of a nation actually enforced, are every where obligatory, unless they interfere with the independency of another Legislature. 2 *Hub.* 26. for, common conveniency renders it necessary to give a certain degree of force to the statutes of foreign nations. 2 *Ld. Kaim. Prin. Eq.* 350. 360.

If nations, unconnected by any tie, thus indirectly give effect to the laws of each other, the principle upon which it is done, must with greater strength prevail in the case of a political union like that of the American States. It is true, that these States are said to be sovereign and independent; but they are evidently bound by a link which must be taken into view, or we shall argue wrong in the abstract. Thus, it is declared by the articles of confederation, that a citizen of one State, is a citizen of every State; and the Congress are not, as Mr. *Adams** has termed them, an Assemblage of Ambassadors; but a sovereign power, and capable of suing like a corporation, without any express statute to enable them. *See ant.* 41.

But, the operation and effect of a sentence, or judgment, of a foreign Court, cannot surely be more binding than the act of a foreign Legislature; and these, *ex comitate et jure gentium*, are in many cases final. 1 *Black. Rep.* 258. 262. *Vatt. lib.* 2. *c.* 7. *sect.* 84. *p.* 147. If a debtor be discharged where the debt was contracted, he is equally so in every other place; so that if *Lockwood* had been discharged by the State of *Connecticut*, this suit would not be maintainable against him even in the *King*'s *Bench* of *England*. *Co. B. L.* 347. The Court of Chancery held itself bound by the decision of a competent foreign jurisdiction, declaring an acceptance to be void; 2 *Stra.* 733. and, because a debt had been discharged according to the *lex loci*, though in the depreciated paper money of *North-Carolina*, Lord *Thurlow*, since the revolution, has refused a *ne exeat regno*, *Brown.* 376. A similar principle has governed the *Supreme Court*, in the case of *Millar* v. *Hall* (ant. 229.) and this Court, in the cases of *Thompson* v. *Young* (ant. 294.) and *Le Clerc* v. *Richette*.

A distinction is likewise to be observed between a foreign sentence *authorizing*, and a foreign sentence *dismissing*, a claim; for, if the proper tribunal dismisses a claim, the sentence is definitive. 2 *Ld. Kaim. Prin. Eq.* 375. and in that description the proceedings, as far as they affect *Lockwood*, must be included. The case in *Carth.* 373. is certainly right as a general rule; but it is liable to several exceptions; for, 1st, The law of one country may indirectly have effect in another, by the voluntary law of nations; 2dly, If a right of action has been legally transferred in one jurisdiction, the rule by which it is to operate, is the same in every other jurisdiction; and 3dly, Where a debtor

* See Mr. *Adams*'s "Defence of the American Constitutions."

has been dismissed by the proper tribunal, it is a protection every where else: And these exceptions take place in considering the question as between nations totally independent and unconnected. It is true, that the *American* States have hitherto been held by a very slight confederacy; but what remedy is to be pursued? Shall we, if the knot is loose, make it still looser? If the union is weak, shall we encrease the debility? Or, when a more perfect consolidation is essential to the national existence, shall we employ repulsion instead of attraction, and thus widen the inconvenient and ruinous distance between the different members of our political body? Neither reason or experience would justify such a construction; and the *United States*, though individually sovereign and independent, must admit, not only the voluntary law of nations, but a peculiar law resulting from their relative situation. 1788.

No cases can be more distinguishable than the present, and that in which the rule for reviving rights and credits at the expiration of a war occurs. There is no doubt, that, on the declaration of peace, a *British* subject could sue here; and, we find, that although our government conceived that they might act as they thought proper with respect to the citizens of the State, yet the instalment laws were never extended to obstruct and protract the recovery of debts due to foreigners. If, therefore, *Camp* is to be considered in the honourable light of an open enemy, the argument for the Defendant is unfounded; but, when it is recollected, that he did not avow his sentiments on the declaration of Independence; and that, nevertheless, he remained in the enjoyment of his property under the laws of *Connecticut* for some time afterwards, it is impossible to regard him in any other light than that of a subject, and subjects are the objects of the municipal law, not of the law of nations. In the case of *Respublica* v. *Chapman* on an indictment for treason *(See ant. 53.)* The Defendant was acquitted, because, in the opinion of the Court, he was not a *subject:* If he had been a subject, he must have been attainted; and being so attainted, he could never have claimed any advantage from the law of nations on the return of peace. Thus, with respect to *Camp*, he was a traitor; the proceedings under the act of *Connecticut* produced a forfeiture and attainder; and the right of action was as exclusively vested in the State (and by the power of that State alone can it be divested) as if he had been taken and executed. The act, indeed, does not speak at all of an enemy, but of such persons as were resident in *Connecticut*, and had joined the *British* troops; for proceedings of this kind are never carried on against an open enemy. The profits of his property may be sequestered during the war, in order to prevent their being remitted, but no forfeiture can take place.

If then *Camp* was a subject of *Connecticut*, he derives no right from the treaty of peace; for, *Great-Britain* could not mean to interfere between that State and her own citizens. The description in the fourth article cannot be extended to him; and though

1788. the sixth article certainly designates persons acting as he has done, yet it gives no farther advantage than to protect his person from molestation, and to preclude any future confiscations of his property. The confiscation of the present debt, &c. was in the year 1779, and no further proceedings are requisite to retain the right which the State thereby acquired. The Marquis of *Carmathaen*'s complaint of laws passed against the treaty did not include laws of this description; for although he must have known that similar ones existed in *Pennsylvania*, he admits, that here there are no acts passed against the treaty. Purchasers under the State are considered by the treaty as holding a good title; but it provides for persons entering into a negociation for the reconveyance of their forfeited estates from such purchasers.

In the case of *Respublica* v. *Gordon*, (ant. 233.) the confiscation was complete before the treaty; and, therefore, though it would have been incompatible with it to have sustained any legal proceedings afterwards in the *Supreme Court* against the Defendant, an act of the Legislature became necessary to divest the right, which the State had acquired by the previous confiscation.

The conduct of the *British* agents can furnish no authority to us; but the reason for their refusing to make an allowance for debts was the difficulty of ascertaining them, and not the presumption of their being recoverable after the peace. Nor does the act of *Connecticut*, repealing all laws against the treaty, affect the law in question, which is directed to an object of mere municipal regulation. The State had a right to do as they pleased with all the confiscated property: and on any, or no consideration, to release all his debtors. Whether, indeed, they had recovered the whole, or a part, or whether they have compounded, or dismissed the debt, it could not enure to the benefit of *Camp*. He cannot now be punished for past depredations; but the property vested in the State of *Connecticut*, cannot be re-vested without her authority.

If the treaty is to be considered as a reversal of outlawry, then a restitution would ensue; but if it is taken in the light of a pardon, that does not divest any thing previously vested in a subject, nor even in the King who grants it, unless by express words. 3 *Bac. Abr.* 810. 2 *Vin.* 401. *pl.* 4. *p.* 404. The right of action in the present case was clearly transferred to *Connecticut*, and neither expressly, or by implication, has she waved it.

After considering the case and arguments, the PRESIDENT delivered the opinion of the Court in these words:

SHIPPEN, *President*.—The question in this case is of importance, both on account of the principles to be established by the decision, and the many cases which may possibly be affected by it. It has been learnedly and ingeniously argued on both sides; but, though large ground has been taken, I think the whole may be reduced to a very moderate compass.

This is not a suit brought by the State of *Connecticut*, or any person claiming property under their local laws, wherein a question can arise, whether effects forfeited by the laws of that State can be recovered here, by the administrators of the person whose estate is confiscated. It is simply, whether the debt has been forfeited there, and actually vested in that State; and whether any thing has occurred which divests it; and whether, under the peculiar circumstances of our relative situation with regard to each other, the Courts of this State can take notice of such confiscation and vesting, so as to preclude the Plaintiff from recovering *here*, a debt due to him *there*, before that confiscation. 1788.

In order to pave the way for a decision of these questions, and to distinguish between the situation of this country, and those treated of by the learned writers on the laws of nature and nations, and the rights of distinct independent sovereignties quoted by the Council, it will be necessary to point out that peculiar, relative situation which these states stand in with regard to each other.

When a resistance was made to the execution of the laws of *Great Britain*, and an actual war took place between us and them, we were not thirteen independent States, but Colonies and Provinces, belonging to, and a part of, a great Empire, comprehending both countries. The resistance was made in consequence of *common grievances* suffered by all the Provinces, from the head of that empire; and it was a struggle to untie the knot that bound us together, and to emancipate us from the dominion of our then mother country. In the prosecution of this plan, all were equally principals, and carried on the war as a common cause, and by common consent, without being tied together by any regularly organized system of Government. The first body that exercised any thing like a sovereign authority, was the *Congress* of the then *United Colonies*, who superintended the whole, and, by the like common consent, were invested with such general powers as were necessary for the prosecution of the war. We afterwards divided ourselves into several distinct governments, by the name of States; still leaving the general power in *Congress*, which, being in a great measure undefined, was exercised, with regard to internal matters, by recommendations to the several Governments, instead of laws; which however had generally the force of laws.

The articles of confederation were not acceded to by all the States for some years. By these articles, each State was to retain its sovereignty, freedom, and independence, and every right not expressly delegated to Congress; but the free inhabitants of each State were to be entitled to all the privileges and immunities of free citizens in the several States. Before the articles of confederation were agreed to, *Congress* had recommended to the several States to confiscate, as soon as might be, and to make sale of all the real and personal estates therein, of their inhabitants, and other persons, who had forfeited the same, and the right to the protection of their respective States.

1788. In consequence of this recommendation, the State of *Connecticut*, in the month of *May* 1778, passed an act to confiscate the estates of persons inimical to the independence and liberties of the *United States*, within that State. By this law, all estates, real and personal, within the State, which belonged to any person, or persons, who had gone over and joined with the enemies of the *United States*, or had aided or assisted them, or should thereafter do so, were declared to be confiscated. The mode of proceeding against those who had been inhabitants, was directed to be by application to the county Court, who are empowered to give judgment and sentence, that all the estate of such persons should be forfeited for the use of the State. The Court is then directed to grant administration of the estates, as in case of intestates estates.—The administrators were to sell such estates, institute suits, recover and pay debts, and deliver over the surplus, if any, into the Treasury of the State. The last clause in the act directs the mode of proceeding as to the estates of persons who never had an abode within the State.

In pursuance of this act, *Abiathar Camp*, (who is stated to have been lately a resident of the town of *New-Haven*,) in the month of *September* 1779, was charged on the information of the select men, before the county Court, with having joined the enemies of the *United States*, and put himself under the protection of the king of *Great Britain*: He was thereupon adjudged guilty, and sentence passed, that all his estate real and personal should be forfeited to the use of the State. Certain parts of *Camp*'s estate were in consequence of this forfeiture seized and sold; but no proceeding was had to recover against *James Lockwood*, the present Defendant, the debt said to be due from him to the Plaintiff, although the Defendant was at that time, and for some time afterwards, an inhabitant of *Connecticut*, and amenable for the same.

And here the question arises, whether the Plaintiff himself can now recover it:

It is contended, on the part of the Plaintiff, that the proceeding against him was as an *enemy*, and not as a *traitor*, and that, therefore, the war being over, his right revives. The sentence against him was certainly not expressly for treason, and there is no judgment against him that, in terms, subjects his person to punishment as a traitor. The act of Assembly directs the proceeding to be had only against the estates of such persons as had joined the enemy, but it distinguishes between such as had been inhabitants of that State, and those who never had an abode within it, but had estates there. The present Plaintiff was convicted as an offender of the former description, being late a resident in the town of *New-Haven*, and is plainly pointed out as a subject. Indeed, the fact is conceded, that he really was a citizen of the State, who joined the enemy long after the declaration of Independence and the organization of our State Governments. He cannot, therefore, be considered in the light of such a public enemy whose rights are said by the writers on the law of nations, to revive after the termination of

the war: The municipal law of the country operated upon him as a subject, and he could not be an object of the law of nations. 1788.

The objection to the Courts of this State, as a sovereign independent State, interposing to prevent the recovery of a debt, on account of the confiscation of it in another independent State, is in a great measure obviated by the statement which I have before made of the peculiar relation that these States stand in to one another. Though free and independent States, they appear not to be such distinct sovereignties as have no relation to each other but by general treaties and alliances, but are bound together by common interests, and are jointly represented and directed as to national purposes, by one body as the head of the whole. The offence, which incurred the forfeiture, was not an offence against the State of *Connecticut* alone, but against all the States in the union: And the act, which directed the forfeiture, was made in consequence of the recommendation of *Congress*, composed of the Representatives of all the States, and was a case within the general powers vested in them as conductors of a war, in which we were all equally principals. Our Courts must, therefore, necessarily take notice of the confiscations made in a sister State on these grounds.*

It remains, then, only to consider, whether this debt was vested in the State of *Connecticut*, and, if it was, whether it is revested in the Plaintiff by the treaty of peace?

All his estate, both real and personal, in that State was confiscated. All things come within the description of *confiscable personal estate*, which a man has in his own right, whether they be in action or possession: This debt was due from a person then residing within the State of *Connecticut*, and was, consequently, confiscated as other debts due there, and the right of action, as well as the debt, was vested in the State.

The 4th article of the treaty of peace, which directs that creditors, on either side, shall meet with no lawful impediment to the recovery of all *bona fide* debts theretofore contracted, is most certainly confined to real *British* subjects, on the one side, and the citizens of *America*, on the other; and it has been always so construed.

As to the restitution of estates, rights, and properties, already confiscated, it is not required by the treaty to be done, even as to real *British* subjects. It is agreed, indeed, by the 5th article, that *Congress* shall recommend it to the several Legislatures to provide for such a restitution; and, as to those of another description, they have liberty given them by the treaty, to reside twelve months in the *United States* to solicit a restitution and composition with the purchasers of their estates, and *Congress* is to recommend to the States, that they be restored on refunding the

* See *Kirby*'s Reports.

1788. money paid for them. But no acts for those purposes have been passed by the Legislatures in consequence of any such recommendations. Indeed, the ample provision made for these people in *England*, seems to have been considered by the government there as an act of justice, for not having been able to obtain a restitution for them by the treaty.

For these reasons, we are of opinion, that *Abiathar Camp* is not such a person as has a right to sue for and recover this debt, already vested by confiscation in the State of *Connecticut*.

Supreme Court of Pennsylvania:

January Term, 1789.

PINCHIN *v.* FRY.

ON the return of a *Certiorari* to one of the Justices of *Philadelphia* county, it appeared, that the Defendant had been summoned to answer *to-morrow*, that is, on the day succeeding the date of the summons, for a debt *under forty shillings;* that the matter in dispute was then referred to three men, who reported the sum of £. 2 2 4. due to the Plaintiff; and that for the amount of this report, the Justice had entered judgment with costs.

Levy moved to reverse the judgment—1st, Because the *summons* was returnable on the next day, whereas the act of Assembly requires that there should be allowed a time not less than five, nor exceeding eight days. 1 *State Laws* 204. And 2dly, Because the summons was to answer a debt under forty shillings, and the judgment was for a greater sum.

BY THE COURT:—Let the judgment be reversed.

HALHEAD *v.* ROSS, *et al.*

MOYLAN had entered a rule for trial at the last term or *Non pros.* The rule being continued 'till this term, a plea was added, and particular facts referred; and upon these a report had been made a few days before the day appointed for the trial of the cause.

Lewis, for the Plaintiff, now objected to the trial's coming on; and *Moylan* insisted that he was entitled to a *Non pros.*

1789. But by M'KEAN, *Chief Justice*:—The subsequent plea and reference virtually vacate the previous rule for trial or *Non pros.* The cause must, therefore, be continued under a new rule.

CALVERT *v.* PITT.

THIS was a *Certiorari* to one of the Justices of *Chester* county. On arguing the case, the judgment of the Justice was affirmed:

And by M'KEAN, *Chief Justice*, it was stated, that conformably to the act of Assembly, the Defendant, after judgment was given against him by a Justice, ought to enter into a recognizance *instanter*, with, at least, one good surety. He may afterwards withdraw his security, or appeal to the Common Pleas within the six days allowed by the act.

JOHNSON *v.* HOCKER.

THIS was an action of debt brought upon a bond bearing date the 24th of *April*, 1779, and conditioned for the payment of £. 500. lawful money of *Pennsylvania*. To the Plaintiff's demand the Defendant pleaded *payment*, and issue was thereupon joined.

On the trial of the cause, *Sergeant*, in order to prove payment to the treasurer agreeably to the tender law, offered to read the following certificate to the Jury:—"Received 29th *March*, 1780, "of Mr. *George Hocker*, the sum of £. 373 6 6. being two thirds "of a bond and interest due to Mr. *J. Johnson* of *Germantown*, "*which he refused to receive when legally tendered to him in presence* "*of Balzer Hidrecks and Conrad Reedheiffer*; the other one third "he left in my hands to be given to such poor and distressed per-"sons as I shall think proper objects of charity. *Isaac Snowden*, "treasurer."

Lewis, for the Plaintiff, objected to the evidence, that this was not a certificate merely official; but containing certain extra judicial facts, to which *Snowden*, like any other witness, ought to be produced and sworn. The consequence of admitting it, would be highly dangerous.

Sergeant answered, that what was surplusage might be rejected, and the paper go to the Jury only as proof of the receipt of the money. If a *Notary* in *England* introduced foreign matter into the protest of a bill of exchange, the Court would strike out so much as was surplusage, but would never suppress the whole. *Snowden* could easily on this occasion be produced; but similar cases may occur at a distance, in which it would be impracticable, and great inconveniency and injustice would result from the precedent.

M'KEAN, *Chief Justice*.—We certainly should not permit Mr. *Snowden*, if he were here, to swear that he was told that such persons were present at the tender: But the question is, whether, having certified what he ought not to certify, the whole ought to be rejected? We think that it ought not. The paper should be admitted to prove, that payment was made to the treasurer, agreeably to the act of Assembly, at the time mentioned in the receipt. All the rest may be struck out; or, indeed, only so much as goes to that point, may be read, and admitted to be proved. 1789.

The CHIEF JUSTICE, accordingly, read to the Jury so much of the certificate as related to the receipt, and suppressed the rest.

The material facts and the law arising in the principal case, were stated in the following charge to the Jury.

M'KEAN, *Chief Justice*.—The evidence that has been produced establishes these facts:—That the Defendant owed the Plaintiff a prior debt of £. 1700. which was secured by a mortgage dated the 23d of *April*, 1768, on a mill and other real estate; that on this mortgage several payments were made at several times; but the interest running eventually greatly in arrears, the Defendant was advised to sell the mortgaged premises, which he did, and *Weiss* (one of the witnesses who has been examined) became the purchaser, for £. 1750. which, it was agreed by the parties, should be paid to *Johnson* on *Hocker*'s account. It appears that *Weiss* accordingly made several payments to *Johnson*; and, it has been contended by the Defendant's Council, that, calculating these and the previous payments, the Plaintiff's demand, including the present bond, has been considerably overpaid. There does seem, indeed, to be a mistake in the sums; but of this the Jury must judge; for, it is in proof, that on the 24th of *April*, 1777, the Defendant became debtor to the Plaintiff, and gave the bond in question; so that if any deceit was used upon the occasion, we think, it is incumbent upon him to shew it to the satisfaction of the Jury.

The Court, then, are clearly of opinion, that this bond must be considered as a new contract; but, even in that light, the Defendant insists, that it was discharged by a tender and refusal on the 29th of *March*, 1780. The tender at that time has been proved; though there is no certainty as to any previous tenders which the Defendant has endeavoured to establish: And here the great question arises, whether this is to be deemed an absolute discharge, or only to be regarded as a tender at common law?—which necessarily leads to a review of the various acts of Assembly upon the subject.

The act passed on the 29th of *January*, 1777. (*2 State Laws 7.*) declares that a tender shall amount to an actual payment and discharge; which is far more extensive than a tender at common law; that operating only to suspend the interest 'till a subsequent demand and refusal have taken place. If, therefore, the tender, on this occasion, was made in continental money emitted by Con-

1789. gress *before the 29th of January* 1777, it is certainly conclusive against the present demand. Conscientious men may, indeed, reflect upon the enormous advantage of making a payment at the rate of sixty for one; but we are bound by the explicit language of the law (except where it violates the Constitution of the State) and must leave those to answer for its policy by whom it was enacted.

But, on the other hand, how will the case stand, if the tender was not made in bills of credit of a date antecedent to the 29th of *January* 1777? The arguments of the Council have differed widely on this ground; and the question is, whether the words of the act apply only to the bills of credit which Congress *had* emitted; or, extend, also, to those bills which Congress *might* emit?

The doubt, in this respect, is not entirely novel. A *British* Serjeant, having a licence in the year 1778, to carry clothing from *Philadelphia* to *Lancaster* for *British* prisoners of war, brought with him some forged paper money, and passed it at the latter place. He was tried for this offence, and the distinction was then taken, that the forgery was of an emission subsequent to the 29th of *January*, 1777. The point, however, did not prove to be material; for, the Court considered the Defendant as an alien enemy, who might, indeed, be punishable for any action *malum in se*, but was not liable to the penalties of a municipal regulation; and, on that ground, directed the Jury to acquit him.

By the act which was passed on the 20th of *March* 1777, (2 *State Laws* 48.) we find that the State paper money then emitted, was only made a tender at common law; for, the words of the act merely declare that a tender in that money shall have the same effect as a tender in specie, which is clearly no more than a suspension of the interest. The succeeding act, passed on the 25th of *May* 1778, (2 *State Laws* 131.) after providing for the exchange of bills of credit issued under the authority of the king of *Great Britain*, gives to the bills of credit issued by Congress only the same currency and effect in payment of debts which the above mentioned act, of the 20th of *March* 1777, had given to the bills of credit emitted by the State; and that, as I have already remarked, did not amount to an absolute discharge of the obligation. By the act of the 3d of *April* 1781, tenders are declared to have no other force than that which was given to them by the laws in existence at the time they were made. 1 *State Laws* 447.

The intention of the Legislature must be collected from the words which they have used, unless a different meaning can be manifestly shewn. The construction, then, that we have put upon the words of the act of the 20th of *March* 1777, (which, by express reference, is made to govern the operation of the act of the 25th of *May* 1778,) is, that the Legislature only intended to make a tender of the £. 200.000 bills of credit equivalent to a tender at common law. There is no satisfactory reason opposed to this construction; and, but for this, the act of the 29th of *January* 1777, might be as well extended to the bills of

credit which were afterwards, as to those which were previously emitted by Congress:—A matter that we are not bound, nor are we inclined to countenance. 1789.

This opinion, unanimously formed, upon mutual consultation, and full deliberation, leads to a more particular consideration of the evidence; and, if the Jury think that the bills of credit, or any part of them, which were tendered to the Plaintiff on the 29th of *March*, 1780, were emitted subsequent to the 29th of *January*, 1777, they must only give this tender the effect at common law.

It may be proper here to notice, that there were two bills of thirty dollars each, in the bundle of paper money tendered; and the Plaintiff's Council has said, that there were no bills of that denomination emitted prior to the 29th of *January*, 1777. But he is certainly mistaken; as I remember well the trial of a man for counterfeiting a *thirty* dollar bill emitted in 1776: and, therefore, this circumstance is by no means conclusive.

But should the Jury, upon the whole of the evidence, find, that this tender was made in bills of credit emitted since the 29th of *January*, 1777, and so not an absolute discharge of the debt, they will next enquire, in what manner the bond ought now to be paid? By the act of the 3d of *April*, 1781, it is declared, that all debts and contracts entered into between the 1st of *January*, 1777, and the 1st of *March*, 1781, shall be liquidated according to the scale of depreciation. The Plaintiff, therefore, is not entitled to recover the whole £. 500. in specie, but only so much as that sum in paper money was worth at the time the contract was entered into; which was on the 24th of *April*, 1777: Nor is he entitled to any interest from the date of the tender until this action (which is to be considered as a new demand) was instituted.

The Jury found a verdict in favour of the Plaintiff for £. 272 3 4. debt with costs: from which, it seems, that they were of opinion, that the tender was not made entirely in bills of credit emitted *before the 29th of January*, 1777; and that they pursued the directions of the Court in that alternative.

STEELE *v.* STEELE.

THIS was an issue joined on the facts alleged in a libel for a divorce: and, upon the trial, the CHIEF JUSTICE observed, that notice ought to be given of the facts intended to be proved under the general allegations of the libel.

RUSH, *Justice;* I think it would be most convenient to give notice, that between two specific dates, acts of cruelty, &c. were intended to be proved.

THE COURT seemed to adopt that idea, and recommended it for the future practice of the bar.

1789.

SMITH *v.* DAVIDS.

A RULE for trial, or *Non pros*, was taken in *September* Term, 1787, and notice at bar was entered on the docket. The cause was afterwards continued, generally, 'till *January* Term, 1789, and no notice given.

The cause being now marked for trial, the Plaintiff moved to put it off.

But THE COURT held, that the rule for trial or *Non pros* was continued; and that no new notice was necessary. If, therefore, the Plaintiff does not go on to trial, the Defendant is entitled to a *Non pros*.

ROBBINS *v.* WHITMAN.

THIS cause was removed by *Certiorari* from one of the Justices of the peace for *Northumberland* county; and, after argument, the judgment of the Justice was affirmed.

It then became a question, whether execution could issue out of this Court upon the judgment so affirmed?

And, it was ruled by THE COURT, that execution might issue at once, without referring the cause again to the Justice; as that would be a circuitous, inconvenient, and unreasonable mode of proceeding.

Common Pleas,

PHILADELPHIA COUNTY.

March Term, 1789.

SCHLOSSER v. LESHER.

THIS was an action of *Indebitatus Assumpsit* for goods sold and delivered. The Defendant pleaded *Non Assumpsit* and *Non Assumpsit infra sex annos:* The issue on the *Non Assumpsit* was tried, and a verdict found for the Plaintiff. To the plea of the statute of limitations, the Plaintiff replied, a writ of summons issued on a particular day within the six years, which was returned *nihil.*

Whether the replication contained matter sufficient to prevent the bar of the statute of limitations, was the question; and after an able discussion by *Ingersoll* and *Sergeant*, for the Plaintiff, and *Levy* and *Todd*, for the Defendant, THE PRESIDENT stated the material circumstances and arguments, and delivered the opinion of the Court as follows:

SHIPPEN, *President.*—Two points have been made in this case by the Defendant's Council:—1*st*, That it does not appear that the process was issued for the same cause of action, as it is not continued to the time of filing the declaration. And, 2*dly*, That if this did appear, the second action should have been brought within a reasonable time after the expiration of the six years; which reasonable time they restrict to one year.

As to the *first* point, it is agreed by the Council on both sides, and it is undoubtedly the law, that where an *original* is replied to the plea of the statute of limitations, it is sufficient to shew when the writ issued *without any continuances;* but where the

1789. writ is a *Latitat* from the *King*'s *Bench*, or a *Clausum fregit*, in the *Common Pleas*, the continuances must be set forth to be entered to the time of filing the bill, or declaration, in order to shew that it was for the same cause of action.

This gives rise to the question, whether our writs of *Capias* and *Summons* resemble more the *original writs*, or the *Latitat* and *Clausum fregit:* And, in order to solve this question, it will be necessary to consider the reason of the difference between these writs in *England*.

The *Latitat* and *Clausum fregit* are both writs of *trespass;* yet, by the course of the Courts of *King*'s *Bench* and *Common Pleas*, the Plaintiff may ground upon them declarations in any personal actions. But, when the declaration is in *Assumpsit* (for instance) a writ of *Trespass* issued within the six years, could not be presumed to be a writ that issued in that cause, unless it was further shewn in the replication, that it was taken out with an intention to declare in that action; and as evidence of that intention, that the continuances were entered from the time of issuing it to the filing the bill or declaration. But, in the case of an *original* proper to the action, *that* is never necessary, because, if the declaration was in *Assumpsit*, the original would shew it was issued in case: if the declaration was upon a bond, the original would shew it was issued in debt; and, consequently, that it was a proper and legal foundation for the action: And the continuances are not necessary to be shewn as a proof that the writ issued for the same cause of action; for, being such a writ as corresponded with the declaration, the law presumes it was for the same cause of action, unless the contrary is shewn.

That this is the reason of the distinction between *originals*, and the writs of *Latitat* and *Clausum fregit*, to this purpose, will appear from this; that whenever the writ which commences the action, is of such a nature as to correspond with the declaration, we find it will be sufficient to set it forth without the continuances, *although it be not an original:* And, on the contrary, whenever the writ does not correspond with the declaration, it will not support the replication without the continuances, *although it be an original.* An instance of the first kind is the attachment of privilege in the *Common Pleas*, which will be found by the precedents, always to specify the nature of the particular action, whether in debt, or case, which is afterwards declared upon; and hence, we find, in 1 *Wils.* 168. the replication shewing only the time of issuing the writ without the continuances, will be sufficient. So, in the reversed case, when a common *Clausum fregit* is the writ, although it be an *original* writ issuing out of *Chancery*, yet, not being adapted to the action of *Assumpsit* or debt, being only a foundation for the *Capias* in the *Common Pleas* and intended merely to give that Court jurisdiction, it will not be presumed to be the foundation of such an action, unless the continuances are set forth from the time of issuing the writ. Hence it is evident, that it is from the disagree-

ment of the writ with the declaration only, that it becomes ne- 1789
cessary to enter the continuances, to shew it issued for the same
cause of action, in order to prevent the bar of the statute of limi-
tations: And, after all, the entry of the continuances in those
cases where they are said to be necessary, is little more than mat-
ter of mere form, as it appears in 1 *Sid.* 53, 60, that they may
be entered *by the attorney in his chamber, at any time*, even after
the statute of limitations is pleaded.

By our act of Assembly, and the practice under it, the writs of *Capias* and *Summons* always specify the nature of the action you are to declare upon, and are, therefore, similar, in this respect, to the *originals* out of *Chancery*, and the *attachments of privilege* in the *Common Pleas*.

The *second* point made by the Defendant's Council is, that, admitting the Plaintiff by issuing the writ, has saved the bar of the statute, yet, that the action ought to have been prosecuted again within a reasonable time after the six years expired, and that *that* reasonable time has been held to be one year.

In considering the dates and times of the several transactions, the period during which the act of Assembly suspended the act of limitations, that is, between the 1st of *January*, 1776, and the 21st of *June*, 1784, is, to every purpose to be thrown out of the computation.—Then, from the time of the cause of action arising, to the time of issuing the summons, is 4 years, 9 months, and 10 days; from that time to the prosecuting the suit again, is 2 years, 6 months and 2 days; making in the whole 7 years, 3 months and 12 days.

The cases cited in support of the second point, are all cases where, by the death of one of the parties, or from some other cause, the action *had abated*, and the Court, in considering what was a reasonable time to permit the party to bring a new action, have drawn their reasonings from the equity of the statute, which provides only for two cases; one, where the Plaintiff had obtained a judgment which was reversed for error, and, the other, where a verdict had passed for the Plaintiff, and the judgment was arrested, and judgment given that the Plaintiff should take nothing by his writ. But other cases arising, which put the Plaintiff in the like situation by an abatement of the action, the Judges thought, that they ought to have a reasonable time after the expiration of the six years to renew their actions; some of them say, *that* reasonable time was in the discretion of the Court, depended upon the circumstances of the case; and others say, that, within the equity of the statute, *that* reasonable time ought to be one year. But these are all cases where the writ had actually *abated*, and could, consequently, afford no support to the new action:—How are the cases of *Originals* and *Latitats*, where nothing had happened to abate the writs? They are considered as subsisting foundations upon which the parties may prosecute their suits; in the one case, by entering the continuances from the time of suing out the writ, and, in the other, without any such continuances; in both cases they are deemed subsisting

1789. writs and the commencement of the action, for the purpose of taking the case out of the statute of limitations, and the prosecution of the suit afterwards is not considered in the light of a *new action*, although some process might be necessary to bring the party into Court. In *Lilly*'s *Pract. Reg.* 19. it is said, "the "taking out the writ of *Latitat* is in nature of filing an *Original*, "and, by doing it, the suit is commenced within the meaning "of the statute, although *he does not declare against* the party "within the time limited by the statute."

As the cases of subsisting writs and abated actions are thus totally different, I have looked for cases where there may be some limited time for proceeding upon the foundation of the old writ, when there has been no abatement of it; and I have met with but one case in which such a limited time has been suggested. It is in 1 *Sid.* 53. where *Twisden*, Justice, says, that he had known a suit continued by *Latitat* for 5 years, before the bill filed; and *Herne*, *Secondary*, said, that a *Latitat* may be continued 7 years. If this may be considered the limited time, the writ in the present case is long within it; as, excluding the suspended period, the suit was again prosecuted within two years and a half.

If this could have been considered in the light of an abated writ, and a reasonable time, in the discretion of the Court, was the rule, we ought certainly to take into our consideration the peculiar situation of our country and the correspondent laws, which restrained creditors from prosecuting their suits with the same advantage as at other times, as they could take out executions only for one third of their debts in one year; and this certainly deterred many from prosecuting their suits at all, during the continuance of that restraint. On this ground, therefore, the allowance in the present case would be very moderate, as it would not extend 3 months and a half beyond the time contended for by the Defendant's Council.

On both points, we are of opinion, that the law is with the Plaintiff.

Judgment for the Plaintiff.

Supreme Court of Pennsylvania:

April Term, 1789.

KENNEDY *v.* NEDROW, *et Ux. et al.*

THIS was an action of dower in 250 acres of land in *Lancaster* county, brought by *Anne Kennedy*, widow, who was the wife of *Richard Johnson*, deceased, against *Thomas Nedrow*, and *Anne*, his wife, *Catharine Wistar*, and *Rebecca Martin*. The tenant pleaded, 1st, a special plea, "That *Richard Johnson*, the "husband, on the 12th of *August*, 1767, made his will, and there- "by devised a moiety of 500 acres of land to his wife, the de- "mandant, in fee; which devise was in lieu of dower: And, "2dly, they pleaded, "That the demandant had sued out a writ "of partition against the tenants for making partition of the said "500 acres of land, and had recovered, &c." To these pleas the demandant replied, the tenants demurred, the demandant joined in demurrer, and issues.

On the *first* plea a case was stated in substance as follows:— "That on the 12th of *August*, 1767, *Richard Johnson* made his last will and testament, and therein bequeathed and devised in *hæc verba;* "*Imprimis*, I give and bequeath unto my loving wife, "*Anne Johnson*, all that my lot of ground, situate, &c. which I "bought of *John Millar*, &c. with the houses, barns, and other "appurtenances thereunto belonging: *Also*, all my household "goods, horses, live stock, and other moveables, which I have "here in *Lancaster*, and in *Germantown*, *Philadelphia* county, to "her, her heirs and assigns for ever: *Also* £.1000 lawful money "of *Pennsylvania*, in bonds and bills, to be paid to her, or her "heirs and assigns, in six months time after my decease, with "interest, by my executor herein-after named. I give and be- "queath unto my brother *John Johnson*, and to each of his three

1789. "sons, and his daughter, &c. the sum of £. 5. to be paid three "months after my decease, &c. I give and bequeath unto my "sister *Anne Nedrow*, all that my 300 acre tract of land, situate, "&c. with the appurtenances, to her, her heirs and assigns for "ever. I give and bequeath unto my sister *Catharine Wistar*, all "that my 300 acre tract of land, situate, &c. to her, her heirs "and assigns for ever. I give and bequeath unto my loving (wife) "*Anne Johnson*, the one moiety or undivided half of all that my "500 acre tract of land, situate, &c. to her, her heirs and as-"signs for ever: *Provided always* that if my said wife *Anne John-"son* after my decease, should be married to another man, that "then she shall have the said moiety during her life, with suffi-"cient power to give and bequeath the same at her decease, to "whomsoever she will, excepting to her second husband, or any "from or under him. I give and bequeath the other moiety, or "undivided half part of my said 500 acre tract of land unto my "three sisters, *Anne*, *Catharine*, and *Rebecca*, each one third part, "to them, their heirs, and assigns for ever. My will is that there "be no water works built or erected on any part of the said 500 "acre tract of land for the space of, &c. I give and bequeath my "tract of land lying, &c. unto my sister *Anne*, and to her heirs "and assigns for ever; under and subject to the yearly rent of "40*s*. &c. to be paid to my loving wife, *Anne Johnson*, and to "her heirs and assigns for ever. I give and bequeath unto my "sister *Catharine*, my twenty and odd acres of land, lying, &c. "and the appurtenances; *also*, twelve acres of wood land to be "cut off a large tract adjoining, &c. to be holden by her, her "heirs and assigns for ever; under and subject to the yearly rent "of £. 6, to be paid to my loving wife *Anne Johnson*, her heirs "and assigns for ever, and also subject to as much firewood as "my wife shall have occasion for, when she comes to live at *Ger-"mantown*. I give, devise, and bequeath to my sister *Rebecca*, "and her son *Paul*, all that my tract of land (the remainder af-"ter the said 12 acres are taken off) containing 50 acres, more "or less, adjoining, &c. to be holden to them, their heirs and "assigns for ever; under and subject to the yearly rent of £. 4, "to be paid to my loving wife, *Anne Johnson*, her heirs and as-"signs for ever; the said tract not to be sold till *Paul* arrives at "30 years of age. I give and bequeath unto my sister *Anne*, all "that my tract of 12 acres opposite the last mentioned 50 acres, "&c. to her heirs and assigns for ever. I give and bequeath £. 50 "to the poor-house keepers of *Germantown*, &c. I give and be-"queath £. 50 to the use of the *Pennsylvania Hospital*. As con-"cerning all the rest and residue of my effects, bills, bonds, "mortgages, monies, and estate whatsoever, not herein before "given, I would have divided equally between my loving wife "*Anne*, and my sisters, *Anne*, *Catharine*, and *Rebecca*, part and "share alike to each of them, their heirs and assigns for ever. "And I do appoint and nominate my loving wife, *Anne John-"son*, &c. to be executors of this my last will and testament.

'The question for the opinion of the Court on this plea and 1789.
'case, is, Whether, upon the whole will, the devises and bequests
'therein contained, or any of them, to the said *Anne*, the de-
'mandant made, are sufficient in law to bar the said *Anne* from
'recovering her said dower?'

The cause was argued at the last term by *Sergeant* and *Bradford*, for the Demandant; and *Coxe* and *Lewis*, for the Tenants: And now the CHIEF JUSTICE delivered the opinion of the Court to the following effect:

M'KEAN, *Chief Justice*.—Two questions have been made on this record, in the discussion of which, the law relating to the subject has been exhausted; The *first* is, "Whether the devises "to the Demandant in the will of *Richard Johnson*, shall be deem-"ed a satisfaction of her dower?" And the *second* is, "Whe-"ther by the action of partition brought by the Demandant, "wherein it is acknowledged that the moiety, out of which dow-"er is now claimed, belonged to the Tenants, she is not stop-"ped from recovering in this action?"

In delivering our opinion on this occasion, we shall avoid a recapitulation of the arguments offered by the Council on either side; confining ourselves to the questions proposed, a brief statement of the reasons of our judgment, and a reference to the books, on which we rely, as authorities to support it.

1. Dower is a legal, an equitable, and a moral right. *Prec. in Chan.* 244. It is favoured in a high degree by law, and, next to life and liberty, held sacred. *Lill. Abr.* 666. *G.* Three incidents entitle a woman to dower: Marriage, seisin, and the death of the husband, 1 *Inst.* 32. *a. b.* And a widow may be barred of dower by a jointure made in pursuance of the statute of 27 *H.* 8. *c.* 10. *sect.* 6. Such a jointure may, indeed, be made either before, or after marriage; but with this difference, that if it is made before, the wife cannot wave it, and claim her dower at common law; which she can do, if the jointure is subsequent to the marriage. No other settlements, however, in lieu of jointures, are bars to a claim of dower; nor, it must be remembered, was a jointure itself any bar antecedent to the passing of the statute of *H.* 8. for, it is established law, that a right, or title, of dower, cannot be barred by a collateral satisfaction. *Wood's Inst.* 125. 1 *Inst.* 36. *b.* Nor, in short, by any thing but *a plain and express intention* of the parties. *Ibid. Finch. Rep.* 368. 1 *Chan. Ca.* 181. 2 *Chan. Ca.* 24. 2 *Vent.* 340. 4 *Co.* 1. 2.

In the will before the Court, it is no where *expressed*, that the devises to the Demandant shall be in lieu of dower; but, it is contended, that the *intention* of the testator collected from the words of the whole will, appears to be, that the Demandant shall be barred of her claim at common law; that the devises to her are of lands in fee; and that these, being of four times the value of her dower, ought to be considered as a recompence, or satis-

1789. faction, for it. But in the *words* of the whole will, we can discover no *express intention* to that purpose; and, although an estate for life, or even during widowhood (which is the same as an estate for life, since it is in the wife's own power to make it such; and these, by the bye, are the lowest estates that will operate in bar of dower, either in a jointure, or will) may be given with the view, and operate to bar a widow's claim at common law; yet, it must appear to be so intended by the *words* of the will, and not inferred from its silence, or presumed upon conjecture: For, no devise to a wife, even of an estate in fee simple, although ten times more valuable than her dower, will be, *of itself*, a bar of dower; but, it will be considered as a *benevolence*, and she is entitled to both. 2 *Freem. Rep.* 242. *Prec. in Chan.* 133.

Nor, in such a case, will equity interpose against the wife; for, I cannot find any instances in which relief upon this subject, has been given, but in the following:—1st, Where the implication, that she shall not have both the devise and the dower, is *strong* and *necessary;* 2dly, Where the devise is *entirely inconsistent* with the claim of dower; and 3dly, Where it would prevent the *whole will* from taking effect: that is, where the claim of dower would overturn the will *in toto*. 3 *Atk.* 437.

In short, the authorities are numerous and explicit, that dower cannot be barred by a collateral recompence; that the devise of any thing to a wife, cannot be averred to be in bar of dower, because a will imports a consideration in itself; and that the devise, without other matter, is to be taken as a *benevolence*, and the devisee deemed a *purchaser*. 4 *Co.* 3. 4. 9 *Mod.* 152. 2 *Vern.* 365. 2 *Freem. Rep.* 242. *Prec. in Chan.* 133. 2 *Will.* 624. 3 *Atk.* 8. 436. 1 *Ld. Raym.* 436. 1 *Lutw.* 734. *Brook (tit. Dower) pl.* 69. *Dyer* 248. 1 *Vez.* 55. 230. 2 *Eq. Abr.* 388. *pl.* 14. 18. 1 *Eq. Abr.* 219. 1 *Brown. Chan. Rep.* 292. To which may be added two decisions in this Court, *Blackford et ux.* v. *Kennedy*, in 1769: And *Kennedy et ux.* (the present Demandant) v. *Wistar*, in 1779.

The Court, therefore, unanimously think, that the devises to the Demandant, in the will of *Richard Johnson*, cannot be deemed a satisfaction or bar of dower in this action.

2. The *second* question enquires, whether the Demandant is barred in this action, by the recovery in the action of partition? And, in support of the affirmative, the Council for the tenants have cited 1 *Roll. Abr.* 862. *pl.* 4. 864. *pl.* 8. *Co. Litt.* 27. *a.*

Dower is an *excrescent* interest taken out of the inheritance for a time, which being elapsed, the interest falls again to the owner of the inheritance. But the institution of the action of partition became necessary to appropriate a moiety of the 500 acres of land to each of the devisees, not merely for life, but for ever; for, the judgment is, that the partition should remain firm and stable for ever. If, then, any other person than the Demandant, had a right of dower in the whole of the 500 acres, although such person could not have been made a party in the partition, the parti-

tion might certainly have been effected, notwithstanding that right of dower. And why should not the same be done in the case before the Court? The devisee held the moiety allotted to her, subject to the claim of dower, and, in doing this, there was nothing inconsistent, or uncommon: Nor, can we perceive, how the recovery in partition, estops the Demandant from saying, that she has a claim of dower in that part of the premises which has been assigned to the Tenant. As, indeed, on the one hand, there is no case, nor *dictum* of any Judge, to warrant this plea, so, on the other, we think reason and justice are against it. The case cited by the Council for the Tenants only says, that, in dower, the Demandant claims dower of lands *unde nihil habet*, &c. and, therefore, she shall be stopped from claiming any thing more. 1789.

Upon the whole, THE COURT are clearly of opinion, and direct, that judgment be entered for the Demandant.

ZANTZINGER *v.* POLE.

A MOTION being made for a rule upon the Sheriff to return a *Venditioni Exponas*, THE CHIEF JUSTICE, upon a doubt expressed by that officer, said, that, by the spirit and words of the act of Assembly, the Sheriff must sell not merely to the *highest*, but to the *best*, bidder; that, therefore, if the highest bidder was unable to pay, the Sheriff might make an offer to the next highest; and that if the property was not paid for after a sale, the return should be, that "the premises were knocked down to A. B. "for so much, that the said A. B. has not paid the purchase "money, and, that, therefore, the premises remain unsold.

PATTON *v.* CALDWELL.

THIS was an action on a policy of insurance, upon the trial of which, *Lewis*, for the Plaintiff, offered to read in evidence a special verdict that had been given in another action upon the same policy, but against a different underwriter. *Sergeant* and *Ingersoll* objected, that the verdict was given between other parties, and, therefore, not admissible; upon which *Lewis* proved an agreement of all the underwriters to be bound by one verdict.

M'KEAN, *Chief Justice*.—The objection turns upon this principle, that the Defendant had no opportunity of cross-examining upon the former trial; and the answer is, that he, with the rest of the underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the Plaintiff's Council.

1788. Whether this agreement was made in person, or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire, that all such agreements may be entered on the records of the Court.

The admission of this evidence, however, cannot be conclusive; as it is manifest, that testimony has been given on the present occasion, different from what was given on the former; and, consequently, a very different verdict may with great justice and propriety take place.

HAMILTON Exor. *v.* CALLENDER's Exors.

THIS action being referred by consent, the following report was made:—"The referrees upon full consideration of all "the circumstances, are doubtful as to the law upon one point, "and have agreed to make their award special, subject to the "opinion of the Court.

"The case submitted to them appeared to be as follows:—On "the 16th of *March*, 1773, *Robert Callender* was indebted to *James* "*Hamilton* in the sum of £. 2120. sterling, for which he gave to "the said *James Hamilton*, a bond and warrant of attorney, and "a mortgage upon an estate in the county of *Cumberland*. It ap- "peared that interest was paid thereon to *March* 1776, and that "receipts for such payments are indorsed on the mortgage.

"*Robert Callender* died, and, sometime after, his executors sold "*part* of the mortgaged premises to *Mark Bird*, who undertook "to pay off the principal sum, together with the interest that "should become due after the date of his purchase.

"It is agreed that *James Hamilton* remitted one year's interest "to the executors of *Callender;* and that *Mark Bird* gave his "bond bearing date the 3d of *May*, 1783, to *James Hamilton* for "£. 651. sterling, being the whole of the interest then due on "the mortgage, exclusive of the year's interest remitted. No "discharge was given upon the mortgage either for the year's "interest remitted, or for the amount of the bond; nor does it "appear, that the executors of *Callender* had any notice of the "bond, or that they had been applied to for the payment of any "interest after the sale to *Bird*.

"*Bird* has never paid any part of the principal, or interest; "and, in the end of the year 1784, a *Scire Facias* issued on the "mortgage; but the sale was postponed from time to time; "and, in the meantime, *Bird* became a bankrupt. On the 19th "of *May*, 1787, however, the estate held by *Bird* was sold under

" the *Scire Facias* for £. 5,500: and another part of *Callender*'s es- 1789.
" tate was sold under the same execution for about £. 1000.

" The point which the Referrees wish to submit to the opinion " of the Court is:—

" Whether *James Hamilton* by taking the bond from *Bird*, un- " der the circumstances stated, has exonerated the executors of " *Callender* from the payment of £. 651. sterling, the sum for " which the said bond was given? Or,

" Whether the mortgaged premises are bound to the execu- " tors of *Hamilton*, notwithstanding the said bond?

" If the Court shall be of opinion that the estate of *Callender* " is exonerated from so much of the interest as the bond of *Bird* " was given for, then we find, that there was due to the executors " of *Hamiltan* on the 19th of *May* last (when the premises were " sold) for principal and interest upon the mortgage, £.4988 18 2, " current money of *Pennsylvania*. But, nevertheless, if the " Court should so determine, the Referrees award, that the whole " of the money arising from the sale of that part of the mort- " gaged premises belonging to *Bird*, and which is stated to have " sold for £. 5,500. should be applied, in the first place, to the " payment of the aforesaid sum of £. 4988 18 2. and the resi- " due to so much of *Bird*'s bond to *Hamilton* as it will extend to.

" But, if the Court shall be of opinion, that the executors of " *Callender* are not exonerated from the payment of so much of " the interest as the bond aforesaid specifies, then we award, that " there was due from the Defendants to the Plaintiff on the 19th " day of *May* last, the sum of £. 6264 18 7. current money afore- " said."

Whether the bond given by *Mark Bird* to the Plaintiff's Testator operated as an extinguishment of so much of the money due upon *Callender*'s mortgage, was the question? And it was argued in *July* term 1788, by *Lewis* and *Wilcocks*, for the Plaintiff; and by *Wilson* and *Bradford*, for the Defendant.

For the Plaintiff, it was contended, that the bond in question was taken merely as a collateral security, in order to entitle *Hamilton* to interest upon the amount. The report (though it is sufficient to give judgment upon) does not say that it was received or given in satisfaction; it is, therefore, to be presumed, that no evidence of that kind was submitted to the Referrees, and the Court must determine the law upon the facts contained in the report.

But, even if the report were amended, and it were expressly set forth, that the bond was given and received in satisfaction, it would not be an extinguishment of the preceding demand, founded on the mortgage. The rule is clear, that a subsequent security of equal dignity is not an extinguishment, so as to annihilate the party's remedy upon his original contract; for that purpose the security must be of a higher nature. Nor will the mere improvement of the security, by adding another surety, amount to an ex-

1789. tinguishment. *Cro. J.* 579. *Hob.* 68. 69. *Moor* 872. *Cro. C.* 85. 86. See 2 *Bac. Abr.* 452. Whether, indeed, by accord or not, one bond is not an extinguishment of another; 3 *Lev.* 55. *Brownl.* 47. 71. Nay, the party's own agreement to accept is not sufficient; for, it must appear to be a reasonable satisfaction. 1 *Stra.* 426. 7.

The bond given by *Bird* was certainly not of a higher nature than the previous security; it was, in fact, inferior; for, a mortgage is a security on real estate, a bond is only personal; and, in the case of a bankruptcy, though neither bonds, or judgments, stand against the general creditors, yet mortgages do.

For the Defendants, it was urged, that the legal doctrine of collateral extinguishments does not apply; for, some cases go further than those produced, and shew that an estate worth a million, would not discharge a bond conditioned for the payment of £. 10. Yet, at common law, the doctrine appears to differ from what the adverse Council wish to establish; *Co. Litt.* 212. *b.* though, it must be admitted that many subsequent decisions have greatly deviated from the principle laid down by Lord *Coke*, that the party's acceptance of any thing, provided it be not of less value than the original contract, in satisfaction, is sufficient. But, notwithstanding the admission that the authorities seem now to extend so far, that a bond from the same party encreasing the sum, or, even where another surety is added, will not be a discharge of a prior obligation; yet none of them are so extravagant as to assert, that it is no discharge where the advantage of converting interest into principal has been obtained; which is in itself a reasonable satisfaction to ground the extinguishment; and, independent of the cases, the broad principle of equity declares, that, when a party is bettered by his bargain, he shall be bound by it.

But, it appears from the report of the Referrees, that there was an absolute giving and taking of the bond; and, as the payment must be according to the will of the Defendant, *Cro. E.* 68. if *Bird* gave the bond in question in payment, we shew that it was accepted, and it is no matter whether that acceptance was in satisfaction, or not, since the bond must be received to the intent with which it was given. 1 *Ld. Raym.* 60. 61.

The case, however, does not, after all, depend upon the doctrine of extinguishment, but upon the act for defalcation; by virtue of which the acceptance of the bond in question may be given in evidence by way of set-off against the Plaintiff's demand. 1 *State Laws*, 48.

For the Plaintiff, in reply, it was insisted, that the object of the act of defalcation was to prevent a multiplicity of suits, and that it could have no possible effect upon the general question, whether *Bird*'s bond operated as a payment or extinguishment *pro tanto* of the preceding debt? This question has been agitated in *England* as well since as before the statute, and the present idea has never been suggested. The act of Assembly speaks of two or more being mutually indebted; and, although it authorizes

a defalcation, it does not define what shall be deemed a payment or extinguishment. 1789.

There is no fair ground to assert that *Hamilton* received an adequate satisfaction by converting the interest into principal; for, he was entitled to have his interest punctually paid; and the books of *Chancery* have gone so far as to declare, that, where money is in arrear upon a mortgage, it was not usury to take interest upon the interest. In the case from *Co. J.* 579. indeed, the interest was also added to the principal; but this the Court did not consider a sufficient bar. Nor was *Hamilton* benefitted in respect to time; for, the bond was given, not to shorten the period of payment, but to protract it; as the money was actually due, and ought to have been previously paid.

After considering the case and arguments, THE CHIEF JUSTICE, at the present term, delivered the opinion of the Court.

M'KEAN, *Chief Justice*.—The case appears to be this:—That the testator of the Defendants gave a mortgage to the testator of the Plaintiff on four several tracts of land. The heirs of the mortgagor sold the equity of redemption of three of these tracts to *Mark Bird*, who, afterwards (on the 3d day of *May* 1783,) executed a bond for £. 651. to the mortgagee; and this bond being for the amount of the interest then due upon the mortgage, also bore interest. No receipt, however, for the bond, for the interest, nor, indeed, any minute of the proceeding, was entered upon the mortgage; nor has any express proof been offered that the bond (upon which there has not been any thing paid) was accepted as a satisfaction *pro tanto* of the money due on the mortgage. The three tracts of land conveyed to *Mark Bird* have been sold in order to satisfy the mortgage; but, proving insufficient, the question now arises, on the circumstances which I have stated, whether the bond given by *Mark Bird* is to be taken, either in law or equity, as a payment, discharge, or recompence, for so much of the mortgage money?

The Court, having maturely considered the case, are of opinion that the bond is not a payment *pro tanto* of the mortgage money; for which opinion they will content themselves with declaring the general principles, and referring to the authorities whence those principles are deduced.

1. First, then, one judgment cannot be pleaded in bar of another, which is of *equal* nature and dignity, no more than one bond, or obligation, can be pleaded in bar of another. *Cro. E.* 817. 2 *Bac. Abr.* 552.

2. In the second place a bond, which is no satisfaction of another bond, cannot be deemed a satisfaction of a mortgage, which is a security of a *higher* nature. To render it a satisfaction, it ought to better the Plaintiff's case, in point of safety, and expedite the time of payment; for, a bond with sureties will not be a satisfaction of one without, unless the time of payment is thereby

1789. shortened. 1 *Stra.* 427. 1 *Brownl.* 47. 71. *Hob.* 68. 69. 1 *Mod.* 225. 2 *Mod.* 136. *Cro. J.* 579. *Cro. C.* 85. 86. 3 *Lev.* 55. 1 *Salk.* 124. 1 *Burr.* 9. 2 *Wils.* 87.

3. And, in the third place, as there is no entry of the bond in question upon the mortgage, shewing that it was received in payment or satisfaction of the interest then due, nor any proof that it was so intended by the parties, a presumption naturally arises, that the bond was merely taken as a collateral, or supplementary security; and no debt, or duty, can be extinguished, but by a security of a higher nature than the first.

For these reasons, we decide the question submitted by the Referrees to the Court, in favour of the Plaintiff, and direct judgment to be accordingly entered upon the report.

DE HAVEN *v.* HENDERSON.

THE Plaintiff was examining a witness to prove the purport of an order given to him by the *Adjutant General*, during the late war, for the restoration of his horse, saddle and bridle, which had been seized by the Defendant, as the property of a disaffected person, although upon trial the Plaintiff was acquitted, when *Levy* objected, that the order itself ought to be produced, or some account given of its loss, before the witness was admitted to give evidence of its contents.

M'KEAN, *Chief Justice*.—The oath of the Plaintiff must be received to prove what has become of the order. It is, I think, the only way in which satisfactory information can be obtained on a point of this nature.

The Plaintiff, being accordingly sworn, and proving the loss of the order, he was allowed to proceed in examining the witness as to its contents.

The Lessee of THOMSON et ux. *v.* WHITE.

EJECTMENT for a house and lot in *Second street*, in the city of *Philadelphia*. The action was tried by a Jury at bar, in *January* term, 1788, and a verdict given for the Plaintiff. A motion was then made by the Defendant's Council for a new trial, which was argued, in favour of the new trial, by *Lewis* and *Heatly*, and, against it, by *Ingersoll* and *Sergeant*, in *January* term, 1789; and, the Court having continued the cause under advisement, gave their opinion in the present term.

The case, upon the evidence, was as follows:—*Dorothy Gordon*, being seized in fee of the moiety of the premises in question, in-

termarried with *Laurence Saltar*, and, having lived long with him, and no prospect of children, she was desirous of making a provision for an only sister of the whole blood, to wit, *Mary*, one of the Lessors of the Plaintiff, whose husband, *John*, the other Lessor, was considerably reduced in his circumstances. It then appeared, that Mrs. *Saltar*, while upon a visit, with her husband, to his brother, *John Saltar*, who resided at some distance, was taken sick; and, after a conversation relative to her estate, it was agreed by her husband and herself, that it should be settled on them for their lives, and for the life of the survivor of them, and afterwards, that it should go to her sister, the said *Mary Thompson*, for life, and the heirs of her body lawfully begotten; and for want of such heirs to the children of her three sisters of the half blood. Mr. *Saltar*, accordingly, procured a deed of the above effect to be drawn by a conveyancer in *Philadelphia;* but the second remainder being expressed to be, "for the *issue of the bodies* of the three half sisters," one of whom was unmarried, Mrs. *Saltar*, when the instrument was read to her, thought the expression indelicate with respect to her three half sisters, and, for that reason, persisted in refusing to execute it, notwithstanding all the persuasion of her friends. Upon this refusal, her husband proposed to her, that a deed should be drawn from them to his brother *John*, who, with his wife, should reconvey the premises to him (the said *Laurence*) and herself, as jointenants, in fee; and he promised that as soon as he got home, he would make his will, or by some other means, settle the estate in the manner that they had before projected. Mrs. *Saltar* hesitated at this proposition; but, on her sister, *Elizabeth Saltar*'s, telling her, that "*she might rely upon him; for, if there was a man in the world, who could be trusted in such a case, it was him;* and on her husband's requesting her to comply, declaring, that "*if there was faith or truth in man, he would honestly perform what he again promised;*" she executed the deed to *John Saltar*, who, with his wife, reconveyed the estate, according to the previous stipulation. Mrs. *Saltar* died in the year 1781, about six months after the deeds were signed; and her husband died, intestate and without issue, about eighteen months after her decease.—Mr. *Laurence Saltar* always, during his life time, managed the estate that had been his wife's, as if it belonged to the Lessors of the Plaintiff: In his last sickness, indeed, when near expiring, he told his brother, that he was very uneasy on account of his leaving no will; and soon after this declaration he lost his reason. 1789.

The preceding facts were proved by *John Saltar* and *Elizabeth*, his wife; together with the confession of the Defendant, that the Lessors of the Plaintiff had the title in equity, although he had it in law. There was, indeed, a contradiction, in some respect, of the case of the Lessors of the Plaintiff, in the testimony of *Abel James*, who related a conversation which he had with *Laurence* and *Dorothy Saltar* a few days before the deeds were ex-

1789. cuted, at which time the witness said, that they had agreed to settle the estate in a different manner.

The motion for a new trial was made on two grounds:—1st, Because the *parol* evidence ought not to have been admitted to go to the Jury: And, 2dly, Because the Jury gave a verdict against evidence.

The CHIEF JUSTICE having stated the case, and the objections to the verdict, proceeded to deliver the opinion of the Court in the following manner:

M'KEAN, *Chief Justice*.—The Court have heard the reasoning in support of the motion, and the arguments against it; and upon a perusal and full consideration of the cases cited on both sides, our opinion is unanimously formed in favour of the Plaintiff.

In support of the first ground assigned for a new trial, it has been urged, that the *parol* proof *contradicted* the deed given by the witnesses themselves; that in *Pennsylvania* lands must pass by *deed*, *will*, or some *writing* signed by the parties, or by the act and operation of law; that a declaration of uses must be by *deed;* that no *parol* evidence should be admitted respecting an agreement, or deed, which may *add* to, *diminish*, *vary*, or *contradict* the agreement, or deed, but only to *explain* it; and that *John Saltar* and his wife were estopped from saying any thing against their own deed. In corroboration of these positions, the following books have been cited: *Cowp.* 47. 260. 2 *Black. Rep.* 1250. 335. 327. 2 *Atk.* 383. 3 *Atk.* 388. 2 *Wils.* 306. 3 *Wils.* 275. *Bac. Man.* 90. *Regula.* 23. 1 *Black. Com.* 78. 79. 2 *Black. Com.* 13. 3 *Bl. Com.* 439. *Bull. N. P.* 357. 5 *Bac. Abr.* 362. *Brown. Chan. Cases*, 92. 94. 2 *Bac. Abr.* 309. 1 *Wils.* 111. *Fitzgib.* 213. 1 *Bac. Abr.* 75. 1 *State Laws*, 462. 3.

Since the statute of frauds and perjuries in *England*, and the act of Assembly for preventing frauds and perjuries in *Pennsylvania*, it has, indeed, been a general rule, that no estate or interest in lands shall pass but by deed, or some instrument in writing, signed by the parties; and that no parol proof shall be admitted to contradict, add to, diminish, or vary from a deed or writing. But, it is certain, that there are several exceptions to this rule, and many cases may be found in which parol proof has been admitted, notwithstanding writings have been signed between the parties. For instance, where a declaration is made *before* a deed is executed, *shewing the design with which it was executed*, the decisions in the Court of Chancery have been grounded upon *parol* proof; and in the case of *Harvey* v. *Harvey*, 2 *Chan. Cases* 180. three successive Chancellors decreed, on the parol proof of a single witness, against a deed of settlement. See *Fitzg.* 213. 214.

In cases of *fraud, and of trusts*, though no trust was declared in writing, exceptions have likewise taken place: 1 *Vern.* 296. *Thynn* v. *Thynn*. As, where an *absolute* deed was given, but intended to

be in trust, on parol proof of the party's intention, the trust was decreed. 2 *Vern.* 288. *Hampton* v. *Spencer; et e contra.* And the same decision was pronounced, in the case of an agreement, or trust, being *confessed* by an answer, although such trust had only been declared by *parol.* *Ibid.* 294. *Bellasis* v. *Compton*, *Prec. in Chan.* 208. *Croyston* v. *Banes.* So, where a party is drawn in, by *assurances and promises*, to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced into writing; although this should not be done, the Court, *if the agreement is executed in part*, will give relief. A man treating for the loan of money on a mortgage, it was agreed that an absolute deed should be given by the mortgagor, and a deed of defeasance executed by the mortgagee; the absolute deed being given, the mortgagee refused to execute the defeazance, but the Court of Chancery interposed to inforce justice agreeably to the agreement of the parties. *Prec. in Chan.* 103. 4. *Skinn.* 143. 9 *Mod.* 88. In another instance, where an absolute conveyance is made for a certain sum of money, and the person to whom it is made receives interest for the money, the receipt of the interest will be admitted to explain the nature of the conveyance. *Prec. in Chan.* 526. 1 *Wils.* 620. *S. C.* 2 *Freem.* 268. 285. 1789.

There are other authorities which bear a strict analogy to the case before us. A copyholder, intending to give the greatest part of his estate to his godson, and the residue to his wife, was persuaded by the latter to nominate her to the whole, declaring that she would give the godson the part designed for him: After her husband's death she refused to perform this promise, and pleaded the statute of frauds and perjuries, but the decree was against her. Again; A father being about to make a will to provide for his younger children, is prevented by his son and heir apparent's promising that he would make the provision for his brothers and sisters: The son and heir afterwards refused to fulfil this engagement; but, on an application to the Chancellor, the decree was also against him. So, where the issue in tail persuades the tenant in tail not to suffer a recovery, in order to provide for younger children, upon an assurance that the tenant in tail would provide for them himself, which he afterwards refuses, equity will compel him to do it. *Prec. in Chan.* 3. *Devinish* v. *Baines.* 2 *Freem.* 34. *Chamberlaine* v. *Chamberlaine.*

A voluntary settlement is made by A. to B. who, afterwards, without any consideration agrees to deliver it up: This agreement shall bind in equity; for a *voluntary* settlement may be surrendered *voluntarily.* *Prec. in Chan.* 69. *Wentworth* v. *Devergine.*

The statute and act of Assembly were made to prevent *frauds*, as well as *perjuries;* they should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. Thus, where there has been a fraud in gaining a conveyance from another, the grantee may be considered as a mere trustee. *Barnard. in Can.* 388. *Lloyd* v. *Spillet.*

1789. In the case now under consideration, Mrs. *Dorothy Saltar* was seized in fee of the premises stated in the ejectment; and had she made no conveyance, her sister, *Mary Thompson*, would have been her heir at law; but her husband, whom she loved, wished to enjoy the estate during his life, and she designed that her sister, and her sister's children should have the estate uncontrolled by her husband. With this view the deeds were executed; and, if the solemn promise and agreement of *Laurence Saltar* is not to be enforced, his heir at law will have the estate, contrary to the intention of all parties.

The question then is, whether the engagement of *Saltar*, not being in writing, although it concerns lands of inheritance, is void by the act of Assembly for preventing frauds and perjuries?

We are of opinion, that it is not; and that the parol evidence was proper to be admitted upon the trial of the cause. Here was a breach of trust in *Laurence Saltar*, a fraud in law, which is not within the act. This is the reason of our judgment; a reason warranted by a due construction of the act, and an attentive consideration of its frame and design; which was, not only to guard against perjuries, but, also, as I have already observed, against frauds. It is to be remembered, that there is no purchaser, *bona fide*, for a valuable consideration, without notice, in the present case; the Defendant claims under the heir at law of *Laurence Saltar*; he ought, therefore, to perform what *Laurence* should have performed; and equity will consider that as done, which ought to have been done; *Grounds, &c. of Law and Equity*, 75. Every man's contract (wherever it is possible) should, indeed, be performed as it was intended.

The numerous cases cited, as well as some determined in this Court, both before and since the revolution (several of which are in point) all turn upon the same principle, and are uniformly in favour of the Plaintiff: And so many uniform, solemn decisions, ought to be always of great weight and consideration, that the law may be certain. I am glad, indeed, that the present motion has been made, because it has afforded an opportunity of full deliberation on the subject, and of settling it upon a satisfactory and permanent foundation.

With respect to the *second* objection, we are clearly of opinion, that the verdict was given agreeably to the weight of the evidence.

And, upon the whole, direct, that judgment be entered for the Plaintiff.

D'UTRICHT *v.* MELCHOR.

THIS cause was tried at bar, in *September* term 1788, and, a verdict being found for the Plaintiff, the Defendant obtained a rule to shew cause why a new trial should not be granted; which was argued at the present term by *Coxe* and *Sergeant*, in support of the rule, and by *Lewis* and *Heatly* against it.

It appeared, that the Plaintiff had bought a tract of land from the Defendant, who had previously purchased it of one *Simpson;* but, as, upon enquiry, no land of the description contained in the Defendant's deed to the Plaintiff could be found, this action, which was an action of *Indebitatus Assumpsit* for money had and received to the Plaintiff's use, was brought, in order to recover back the consideration money that had been paid; and, on the trial, the Defendant's deed was given in evidence to prove the amount and acknowledgment of such payment. The declaration also contained a count in the nature of *deceit;* but, by agreement of the Council, it made no part of the argument, whether this could properly be coupled with the *Assumpsit;* so that the motion for a new trial was supported only upon these grounds:—1st, That the action of *Assumpsit* would not lie; and 2dly, That the deed ought not to have been given in evidence upon the trial. 1789.

For the Defendant, it was contended, that, as there was no suggestion of fraud to vitiate and annul the original contract of the parties, the proper action was covenant on the words grant, bargain, &c. that if there was fraud, the remedy was an action of deceit; that *Assumpsit* would not lie; that if there was any deceit in the words of the deed, still the action might have been brought upon the deed itself; that a deed cannot be given in evidence to support an action of *Indebitatus Assumpsit;* that there was no proof of a parol *Assumpsit;* and that the Defendant could not plead a verdict in the present suit, in bar to another action of covenant upon the deed. See *Com. Dig.* 145. *letter F.* 1. *Cowp.* 414. 418. 818. 819. *Doug.* 132. 1 *State Laws*, 79. 1 *Salk.* 210. *Cro. J.* 506. 1 *Roll. Abr.* 278. 1 *Vin. Abr.* 277. 2 *Black. Rep.* 1249. *Gilb. L. of E.* 183. 12 *Vin.* 190.

For the Plaintiff, it was answered, that whenever natural justice implies that the party ought to refund, this action, which is like a bill in equity, will lie to compel him; that the deed was not the foundation of the action, but given in evidence merely to shew the amount of the consideration money, and the Defendant's acknowledgment of its being paid; and that the declaration was supported by the precedent in *Doug.* 18.—See *Salk.* 22. 1 *Lev.* 102. *Bull. N. P.* 31. 2 *Stra.* 915. 1 *Lord Raym.* 742. 2 *Burr.* 1088. *Salk.* 284.

The case being held for some days under advisement, the Chief Justice now delivered the opinion of the Court to the following effect:

M'Kean, *Chief Justice.*—It is unnecessary at this time to determine, whether the Plaintiff might have instituted an action of covenant, or deceit, in order to obtain a redress of the wrong which he has sustained; for, we think it is sufficient for his purpose, that an action of *Assumpsit* for money had and received to his use, has been brought; and that, to maintain this action, he may give in evidence, that the Defendant got his money by mistake, imposition, or deceit. To prove the alleged mistake, im-

1789. position, or deceit, deeds or other writings, which are not the immediate foundation of the suit, but only leading to it, may be read.

We are all, therefore, of opinion, that a new trial ought not to be granted.

Judgment for the Plaintiff.

OXLEY et al. *v.* OLDDEN

THIS cause had been referred, and the Referees, having examined the evidence in presence of both parties, agreed upon their report; but about an hour before it was delivered into Court (though it was signed the preceding day) *J. B. M'Kean*, on behalf of the Defendant, had obtained a rule to shew cause, why the rule of reference should not be struck off.

There was no charge of irregularity or partiality against the Referees; and, after argument by *Lewis* for the Plaintiffs, and *Ingersoll* and *J. B. M'Kean* for the Defendant, the rule to shew cause was discharged.

And M'KEAN, *Chief Justice*, observed, that the motion was much too late to annul the reference, when the Referees had investigated the whole transaction, had agreed upon their report, and were clear from any imputation of misconduct, or any precipitancy in refusing to hear the testimony offered by either party.*

LEVINZ *v.* WILL.

THIS action was tried at *July* term 1788, when, by consent a verdict was given for the Plaintiff, for the sum of £. 687 5. with six pence costs, subject to the opinion of the Court on the following facts:—

"The Plaintiff executed and acknowledged a mortgage on the 3d day of *September* 1782, which was recorded on the 30th of *October*, 1783. The mortgaged premises being sold by the Defendant, then Sheriff of the city and county of *Philadelphia*, the balance, after deducting the sum for which the land had been sold, was paid to the mortgagee. Afterwards, to wit, on the 16th of *July*, 1785, the Plaintiff made an assignment of all his property for the use of all his creditors, and the assignees bring this action, in his name, to recover the money thus paid over to the mortgagee.

"If the Court shall be of opinion with the Defendant on the foregoing case, then judgment shall be entered for him; otherwise judgment to stand for the Plaintiff for the sum specified in the verdict."

* In *Pollock* v. *Hall*, S. C. *Sept. T.* 1800, it was deliberately decided, after a review of all the precedents, and upon full argument, that the Plaintiff could not discontinue his suit, after Referees had agreed upon a report, though it was not filed. *Mss. Rep.*

The question was whether a mortgage, not recorded within six months, is good against the mortgagor? And it was argued on the 5th of *January* 1788, by *Wilson* and *Ingersoll*, for the Plaintiff; and *Sergeant* and *Bradford* for the Defendant. 1789.

For the Plaintiff, it was urged, that, on account of the notoriety of conveyances at common law, they were not liable to so many frauds as modern alterations in the mode of transferring property tended to introduce. To prevent these, however, several salutary statutes have been made, which, principally, have in view to protect the rights of honest creditors, and *bona fide* purchasers. Thus, by the act of Assembly, 1 *State Laws*, 79. it is expressly said that "no deed, or mortgage, or defeasible deed, "in the nature of mortgages, hereafter to be made, *shall be good* "*or sufficient to convey or pass any freehold or inheritance, or to* "*grant any estate therein for life or years*, unless such deed be "acknowledged or proved, *and recorded within six months after* "*the date thereof*, where such lands lie, as herein before directed "for other deeds:" And upon the construction of this clause the present case depends.

By a subsequent act of Assembly, indeed, the neglect or omission to record an *absolute conveyance* within six months, makes it only void against a subsequent purchaser, or mortgagee, for a valuable consideration; 1 *State Laws*, 520. but there was abundant reason to vary the intent and form of the expression in the two cases; because, on an absolute conveyance possession accompanies the deed, which does not take place on a mere mortgage; and the object of the Legislature was, to prevent a false and delusive colour of property. Since, then, the mortgage, for want of being recorded within six months, was not sufficient to convey or pass any estate, the Plaintiff, or rather his creditors who use his name, are entitled, in this action, to recover the money back from the Defendant, that has been paid to him on account of a deed, or instrument, which the law had previously made void and nugatory.

For the Defendant, it was contended, that, although the letter of the act was against him; the spirit of it, which is the true guide in the construction of laws, was in his favour. It is a general rule, that cases without the letter, if within the mischief, shall have the remedy. 4 *Bac. Abr.* 648. Nay, words shall sometimes be expounded against the letter, in order to maintain the intent. 19 *Vin.* 519. 1 *Black. Com.* 61. Statutes must be expounded by a consideration of the previous law, the mischief complained of, and the remedy provided. *Ibid.* 512. Now, by the common law, the mortgage would have been good, although not recorded; and the sole reason, for calling for a record of the deed, must be to protect subsequent purchasers, since it could be of no consequence to the mortgagor himself. The construction of this very act has, in another respect, been contrary to the letter; for, it requires, that the deed shall not only be executed, but acknowledged and recorded; and yet the execution, without the acknowledgment, has always been held sufficiently binding on the party.

1789. But the authorities to this point are express and numerous. By the statute of 13 *Eliz. c.* 10. all leases by ecclesiastical bodies for longer terms than three lives or twenty one years are declared "utterly void to all intents and purposes, any law, custom, or "usage, to the contrary thereof notwithstanding;" and, yet, as no Legislature could mean to make a man's act void against himself, the mischief, which was the impoverishing their successors, has always been deemed sufficiently suppressed by vacating longer leases after the death of the grantors, but the leases, during their lives, being not within the mischief, are not within the remedy. 1 *Black. Com.* 87. Where it otherwise, the grantors would be allowed to do wrong to other persons. 3 *Bac. Abr.* 390. And every principle that applies in that case, equally applies in the one before the Court. By the act of Assembly, 1 *State Laws* 520. an absolute conveyance, not recorded within six months, is made void against a subsequent purchaser for a valuable consideration; but, let us suppose, that such subsequent purchaser had notice of the previous conveyance, it is certain that he would not be protected by the act, although his case would come fully within the words.

Thus, also, the words of the *English* statute of frauds and perjuries, 29 *Car.* 2. *c.* 3. *s.* 1. are as strong as those in the act now under discussion; and any agreement which is not to be performed within a year from the making thereof, is declared to be invalid both in law and *equity;* and, yet, if an agreement to lease for a longer term is confessed in an answer to a bill in Chancery, the Court will compel the party (though the law has expressly declared the agreement void) to execute the lease. In *Cowp.* 141. 2. is a case within the *letter* of a rule of the *King*'s *Bench*, respecting warrants of attorney given by persons in custody, and yet, as it was not within the *intent*, the Court refused to consider it within the remedy. But, it is clear, that, if the common law could not grant relief, a Court of Equity would; 2 *Eq. Ca. Abr.* 684. 1 *P. Will.* 279. See 4 *and* 5 *W. and M. c.* 20. And this Court exercises both jurisdictions. Against *Levinz*, the Defendant has a specific lien in equity, though the mortgage had been void (which is denied) at common law; and, notwithstanding the action is brought in his name for the use of others, the assignees can be in no better situation than the assignor, and are bound by the same equity. 1 *Chan. Cases*, 170. If, indeed, a judgment, or mortgage, had been obtained by any person before the sale of the land, and actual payment of the money to the Defendant, the preference so obtained at law, would have been conclusive against him; but, as the case stands, the Court will do justice and support right. If a father conveys to a child for love and affection, though this will not be good as a bargain and sale, it is good in equity as a covenant to stand seized to uses. 3 *Eq. Ca. Abr.* 482. *pl.* 19.—See how far a deed operates against the maker; 4 *Burr.* 2209. And the relief in cases of defective titles. *Gilb. For. Rom.* 228. 1 *Eq. Ca. Abr.* 357. 385.

For the Defendants, in reply, it was observed, that the arguments of the adverse Council proved the imperfection of human language; for, never were words more definite, more clear, than those in question, and yet, it is contended that they do not express the intention of the Legislature that used them. Two general positions, however, are to be discussed—1st, Whether a mortgage not recorded within six months is absolutley void? and, 2dly, Whether the creditors can take any advantage which the Defendant himself could not? But we trust that the decision of the first will be so plain, that it is hardly necessary to consider the second. 1789.

1. The cases cited from 4 *Bac. Abr.* and 19 *Vin.* contain nothing but general observations, that where the meaning of the Legislature is evidently different from the letter of the act, the latter shall be construed agreeably to the former: and this it is not intended to deny. But we contend, that the Legislature had in view the protection and interest of creditors, as well as subsequent purchasers; to prevent frauds upon those, as well as to secure the rights of these; and there is no just reason for giving the one class a superiority over the other, since all the bankrupt acts, by which the present act may in this respect be explained, are made to prevent a false appearance of property, by which men may be induced to give credit, as well as to purchase an estate.

There must be some force given to all the words of the Legislature, as well as to the words of a deed; and, as the words vary in the two acts, 1 *State Laws* 79. *and* 520. we must presume there was an intentional variation of the meaning. The case from *Black. Com.* on the 13. of *Eliz. c.* 10. shews that the statute was made for the benefit only of the successors of ecclesiastical bodies; and had no respect to the party himself or to his creditors. But we will meet them on the statute of frauds and perjuries, from which they have argued by analogy; for, are not leases for more than three years void? It is said, that if an agreement to lease for more than three years is confessed in an answer, the Chancellor, if money has been received, will compel a performance: though we do not admit this doctrine, it does not affect the present argument, which turns upon the validity of a mortgage actually executed. A deed of bargain and sale not inrolled is void. 1 *Danv. Abr.* 696. 2 *Vern.* 564. The case from *Cowp.* was that of an attempt to commit a fraud, which vitiates every transaction.

But, we still insist, that where the letter is plain, the Court cannot construe it differently. *Term. Rep.* 101. It would, indeed, be the assumption of a dispensing power, if the Judges could give relief against a positive act.

Property is the foundation of credit; and hence, with an admirable independence of the prejudices in favour of *English* jurisprudence, one of the first acts of this Province recognized it as such; so that by the silent operation of the law for taking real estate in execution, the whole is, in fact, mortgaged to creditors in case of the death of the possessor. But where a mortgage is

1789. actually executed in *Pennsylvania*, the mortgagor remains in possession, although the legal title is in the mortgagee; and hence the necessity for the precautions required by the act of Assembly. The statute of enrolments, 27 *H.* 8. *c.* 16. has the same expression; and the construction under that statute is, that deeds of bargain and sale, have no operation to transfer the estate, 'till they are enrolled; but, when that is done, the deeds operate *ab initio*, by relation, as in the case of letters of administration, or assignments under commissions of bankrupts; and that, as Lord *Coke* says, *by the words of the statute.* 2 *Inst.* 647. But the words of the act of *Pennsylvania* are in the negative, that no interest shall pass; and, therefore, although the deed may have the effect of a covenant, and be, in many other respects obligatory *on the person* of the mortgagor, it cannot convey any interest in the land unless duly recorded.

2. But, to notice the *second* proposition, whether the assignee can derive an advantage to which the assignor would not be entitled, it is clear that the latter may sue his debtor for the benefit of the former: *Term Rep.* 619. And, although, generally speaking, the assignor and assignee must stand on the same footing; yet, as in the case of an innocent purchaser without notice of a previous conveyance, so in the case of an honest creditor deluded by a fictitious appearance of property, there may be circumstances which place him in a more favourable point of view.

Neither, upon the whole, is there any ground to complain of hardship, for the Legislature, considering the situation of the country, gave ample time for recording deeds, that had been neglected, by the act of the 23d of *September*, 1783. 3 *State Laws*, 226. And the universal understanding upon this subject has been, that a mortgage is absolutely void, to all intents and purposes, if not recorded within the six months prescribed by the law.

The cause having been for some time under advisement, THE CHIEF JUSTICE delivered the opinion of the Court as follows:

M'KEAN, *Chief Justice.*—The judgment in this case depends upon the construction of the acts of Assembly, 1 *State Laws*, *pages* 79 *and* 520.

It is to be premised, that the *reason* which induced the Legislature to make such acts as take away the common law, may be, and usually is, urged, as the rule by which the acts ought to be construed. In doubtful cases, therefore, we may enlarge the construction of an act of Assembly, according to the *reason and sense* of the law-makers, either expressed in other parts of the act itself, or *guessed* by considering the *frame and design of the whole.* 11 *Mod.* 161. *Archer* v. *Brokenham.* And the original intent and meaning is to be observed. 11 *Rep.* 73. *Magdalen College Case.* Where, indeed, the expressions in an act of Assembly are in *general terms*, they are to receive a construction that may be agreeable to the rules of common law, in cases of a similar nature. 19 *Vin. Abr.* 512.

1789.

The *original intent*, then, of the makers of the law immediately under consideration, and their *principal reason*, seems to have been to prevent honest purchasers, or mortgagees, of real estates, from being deceived by prior secret conveyances, or incumbrances; and, therefore, they have directed that such conveyances, or incumbrances, shall be recorded in six months, or that they should not be sufficient to pass any estate. Thus, by having recourse to the offices of the recorders, any one may ascertain the previous liens upon the property, which he wishes to purchase, or to receive as a pledge; and this amounts to a *constructive* notice to all men, and supersedes the necessity of *express* personal notice. But the Legislature did not mean, nor have they, in fact, enacted, that express personal notice, where given, should have no effect: Neither could they entertain an idea of defeating fair and honest bargains, which do not injure other persons: And, if this unrecorded deed can be obligatory in no other manner, it may certainly operate as a covenant to stand seized to uses. 2 *Wils.* 72. 105.

But why should it not be good as between *John Levinz* and the grantee, since by construing it so, no one else can be hurt, and the deed was clearly delivered for securing a just debt, without any suggestion of fraud in the transaction? It is true, it would not have been valid against a subsequent grantee, or mortgagee, whose deed or mortgage was regularly recorded; but we think it is efficient against *John Levinz*, and all other persons; that the deed, so far, is sufficient to pass the lands, and that, under it, the possession of the premises might have been recovered in an ejectment.

There is a great variety of cases which confirm this opinion, and some of them have been already cited by the Defendant's Council. Thus, with respect to church leases, the statute enacts, that they may be made for twenty one years or three lives, from the date; and, if made for a longer term, that they shall be *utterly void*, any law, custom, or usage, to the contrary. And, yet, leases for a longer term have always been adjudged good against those who made them; because, that could do no wrong to the successors, or to any other persons. See 1 *Eliz. c.* 10. *sect.* 5. 3 *Bac. Abr.* 390. *Cowp.* 141. So, likewise, notice of a judgment, though not docqueted, will bind a purchaser, notwithstanding the express words of the statute of 4 *and* 5 *Will. and Mary*, *c.* 20. *sect.* 3. by which it is declared that judgments *not docqueted*, shall *not affect lands*, as to purchasers or mortgagees. 2 *Eq. Abr.* 684. In the case of a lease made in *Ireland*, where there is a statute providing, that all leases which were not registered by a certain day, should be *void*, if a subsequent lessee had *notice* of the prior lease, though not registered, it shall be good against him. 2 *Eq. Abr.* 282. *Ca.* 19. And, in the instance of a surrender of a copyhold by way of mortgage, not presented to the Court in time, the surrender will nevertheless be valid against voluntary dispositions, or creditors; and that, although by the custom of the manor, confirmed by act of Parliament, all such surrenders were to be *void*,

1789. if not presented in twelve months after they were made. 1 *Chan. Ca.* 170. 2 *Vern.* 564. These, indeed, were considered in the nature of purchasers by defective conveyance, and the law as a penal one. See, also, 1 *Will.* 279.

Upon the whole, the Court are clearly of opinion with the Defendant, and direct judgment to be entered accordingly.

Judgment for the Defendant.

QUESNEL *v.* MUSSI.

THE Defendant being sued by a *Capias* in this action, *Heatly* obtained a rule to shew cause why the writ should not be quashed, upon proof that the Defendant was a freeholder.

Ingersoll and *Du Ponceau* opposed the rule, and produced the records of two judgments which had been obtained against the Defendant *before a Justice of the Peace*, &c.

BY THE COURT: This is a sufficient ground to defeat the privilege of a freeholder.

Let the rule be discharged.

PARKER et al. *v.* WOOD.

SCIRE Facias on a mortgage of lands in *Northampton* county. The cause was tried at *Easton*, when a verdict was taken for the Plaintiff, subject to the opinion of the Court, on the following case:

"That the Defendant, *Wood*, on the 20th of *June*, 1776, made and executed the mortgage deed in the record set forth; and, *on the 5th day of July*, 1776, acknowledged the same before *Peter Kuchlien*, Esquire, then holding a commission as one of the Judges of the Court of *Common Pleas* for the county of *Northampton*, *from John Penn*, *Esquire*, *late Governor of the Province of Pennsylvania;* but he had not received any such commission after the declaration of Independence, nor any notice of that declaration.

"That the said mortgage was afterwards, to wit, on the 3d day of *November*, 1776, recorded by *Lewis Gordon*, Esquire, in the record book kept for recording deeds and mortgages in the said county, he, the said *Lewis*, at the declaration of Independence being recorder of deeds in and for the said county, and continuing, as such, to do and perform the duties of the said office, until the said 3d day of *November*, and after; but he had received no commission for so doing after the 4th day of *July*, 1776.

"That the said mortgaged premises were afterwards taken in execution, set up to sale, and sold by the Sheriff of the said county to *G. A. Baker* under certain conditions, and at the time of the

deed from the Sheriff to the said *G. A. Baker*, an agreement was made relative to the premises in case the said mortgage should be adjudged to be valid. 1789.

"That the Defendant, *Jacob Wood*, at the time of the said purchase made by *G. A. Baker*, was indebted to the said *G. A. Baker*, by judgment entered in the *Common Pleas* of the said county, prior to the aforesaid sale by the Sheriff, and to the Plaintiff's judgment against the Defendant. And that *G. A. Baker* knew of the said mortgage before the contracting of the said debt to him.

"If, upon the whole matter, the Court shall be of opinion that the law is with the Plaintiff, then judgment to be entered for him; otherwise, judgment to be for the Defendant as in the case of a nonsuit."

The question was, whether a mortgage, acknowledged before a justice of the *Common Pleas*, and recorded by the Recorder of the proper county, subsequent to the declaration of Independence, was void?—the Justice and the Recorder having no other commissions, than those which they had respectively received from the late Governor of the Province, previously to such declaration.

The case was argued in *January* term last, by *Bradford* for the Plaintiff, and *Biddle* and *Ingersoll* for the Defendant.

For the Plaintiff, it was urged, that, although the statute of *4 and 5 W. and M. c.* 20. enacts, that, unless a judgment is docqueted, it shall not affect purchasers; yet judgments have been held good, in a *variety* of cases, contrary to the letter of the act: 2 *Eq. Ca. Abr.* 684. And equity will supply a defect in a mortgage. 1 *Eq. Ca. Abr.* 320. The authorities cited in *Levinz* v. *Will. ant.* 430. on the point of notice, are equally applicable here: And, even if the Justice would have had no authority to take the acknowledgment of the deed, after notice of the declaration of Independence, the want of such notice is sufficient to justify him. Besides, during the same period a considerable number of deeds were recorded, (which was proved by the recorder of deeds for the city and county of *Philadelphia*) so as to render it necessary at least to apply the maxim of *communis error facit jus*, to cases of this description. *Lloyd* v. *Taylor ant.* 17. The mortgage, according to common acceptation, was duly acknowledged and recorded; and, as the record of a mortgage could only be required to give a constructive notice to subsequent purchasers, the spirit and meaning of the law is satisfied by the actual notice which *G. A. Baker* had of the deed. See 2 *Eq. Ca. Abr.* 482.

For the Defendant, it was contended, that, *in strict law*, the acknowledgment and recording before officers whose commissions were expired, did not make a valid acknowledgment and recording of the mortgage; so that by the act of Assembly, 1 *State Laws*, 79. the mortgage was absolutely void: And that, *in point of equity*, as the mortgage might have been recorded in the proper office after the 14th of *March*, 1777, the Plaintiff had neglected a fair opportunity of giving legal notice of his lien, for want of which the Defendant had been induced to lend his money, and that,

1789. therefore, the Plaintiff, and not the innocent purchaser, ought to suffer; for a judgment creditor is within the equity of the rule in favour of purchasers. 19 *Vin.* When, indeed, it is impracticable to comply fully with a law, the compliance should be as near as possible; and, from the act passed on the 23d of *September*, 1785, the Legislature evidently considers acts done by officers under the Provincial Government to be void; for, at the same time that provision is made for enlarging the time of recording mortgages, executed between the 1st of *January*, 1776, and the 18th of *June*, 1778, (which was the case of the mortgage in question) there is a positive reservation in favour of judgments, and other liens, obtained during the intermediate period, and before the record was actually made. 3 *State Laws*, 227. But this more conclusively appears from the acts of the 28th of *January*, 1777, and the 31st of *August*, 1778, when all officers (with some specific exceptions) under the former government are totally disqualified, and considered as having been incapable of discharging the functions of their respective offices. See 1 *State Laws*, 3. 137.

After the Court had held the case for some days under advisement, THE CHIEF JUSTICE delivered their opinion to the following effect:

M'KEAN, *Chief Justice.*—The decision of the Court is, unanimously, in favour of the Plaintiff; and the reasons of the decision I will briefly recapitulate.

1st, Because the Legislature declared by an act of the 28th of *January*, 1777, that all acts of Assembly passed before the 14th of *May*, 1776, ceased to have any obligatory operation from that day until the 10th of *February*, 1777: And, consequently, there was no law which required mortgages to be recorded during that period.

2*dly*, Because the mortgagee did all he could to give constructive notice of the mortgage, by having it copied into the book, in which deeds and mortgages had been before recorded, and by the former officer; of which too the Defendant's subsequent judgment creditor and purchaser at the sheriff's sale, had previous notice.

3*dly*, Because it appears from the evidence of the Recorder of deeds, that, for the city and county of *Philadelphia* only, there had been three hundred deeds, fifty two mortgages, and four assignments, copied in the same manner into the books of his office, during the above mentioned period of nine months, from *May*, 1776, to the 10th of *February*, 1777; and as there is no doubt that many instruments are in a similar predicament in every county of the State, the maxim of "*communis error facit jus*," strongly applies to the present case.

And, 4*thly*, Because all transactions in the *Land Office*, and other offices, during the *interregnum*, which were in themselves fair and honest, have uniformly been considered as valid, for the sake of public convenience.

Judgment for the Plaintiff.

Common Pleas,

PHILADELPHIA COUNTY.

June Term, 1789.

HOLMES *v.* COMEGYS.

THIS was a *Scire Facias* against the Garnishee in a *Foreign Attachment*, upon the trial of which the confidential agent, or factor, of the original Defendants, who was casually attending in Court, was offered as a witness to prove effects in the hands of the Garnishee.

Levy, objected to the admission of the witness; and contended, that he ought not to be allowed, or, at least compelled, to give evidence of matters confidentially communicated to him as an agent; and that the Court had then no power over him as a witness, because he had not been *subpœna'd* to attend.

But by SHIPPEN, *President*:—It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a Court of Justice, in a cause against his constituent. It is straining the matter of privilege too far: And, if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence.

BY THE COURT:—Let the witness be affirmed.

PHILLIPS *v.* HYDE.

DEBT upon a *Replevin* bond, after judgment *de returno habendo* in the *Replevin*, and thereupon a return of *Elongatur*.

Sergeant, on the trial of the cause, offered witnesses to prove, that the goods had been tendered to the Plaintiff; and, therefore, that the condition of the replevin bond had been performed.

1789. *Levy* opposed the admission of this testimony, and contended that no evidence could be received to contradict the sheriff's return. See 12 *Mod.* 424. *T. Raym.* 485. 7. 2 *Mod.* 10. 11. *Cro. E.* 872. *pl.* 9.

Sergeant, in reply, admitted, that some returns of the sheriff could not be traversed; but, he contended, that the return of *Elongatur* was not of that class. See 12 *Mod.* 426.

THE COURT over-ruled the evidence.

A question then arose, Whether the Jury could include the costs which had accrued on the *Replevin*, in their verdict in the present action. And THE COURT were clearly of opinion, that they could, and ought to do so.*

Conformably to which was the verdict of the Jury.

ADAMS *v.* LA COMB.

REPLEVIN. The material question, on the trial of this cause was, Whether the goods of *a stranger*, being removed from the premises before a distress, could be pursued and seized, within the thirty days, which the act of Assembly allows for pursuing and seizing the goods of *the tenant?* See 1 *State Laws*, 433, &c.

SHIPPEN, *President*, in the charge to the Jury, delivered it as the clear opinion of the Court, that the right of pursuing and seizing goods after their removal, was confined to the goods of the Lessee, from whom the rent was really due; and that the goods of a stranger could only be distrained while they were on the premises.

* *Sergeant* having suggested, that both the points in this case, had been otherwise determined in a case of *Jackson* v. *Webb*; Mr. *President* SHIPPEN said, that the matter was there left upon equitable circumstances to the Court.

Supreme Court of *Pennsylvania.*

September Term, 1789.

M'CULLOUGH, Assignee, *v.* HOUSTON.

THIS was an action brought by *Hugh M'Cullough*, as assignee of *Samuel Young*, upon a promissory note drawn by *John H. Houston*; and, on the trial of the cause, a verdict was given for the Plaintiff, subject to the opinion of the Court on the following point:

"Whether the indorsee of a promissory note, takes it subject to all equitable considerations, to which it was subject, in the hands of the indorser, the original payee?" And, if the opinion of the Court was in favour of the Defendant, a new trial was to be awarded.

The point was argued at the last term, before all the Judges, by *Sergeant*, for the Plaintiff, and *Ingersoll*, for the Defendant.

For the Plaintiff, it was observed, that in the act of Assembly, making bonds and notes negotiable, there is no provision enabling the promissee, or drawee, to bring an action on the note itself; 1 *State Laws* 77. that such an action did not lie at common law; and consequently, that wherever it had been brought in *Pennsylvania* (which is in numerous instances) the proceeding must have been founded on the statute of 3 *and* 4 *Ann. c.* 9. and the law of merchants. That statute, therefore, must be considered as extended in practice to this country before the revolution; and a legislative sanction is given to the practice by the act of Assembly, which declares, that such parts of the statute law of *England*, as were heretofore in force, shall still be binding in *Pennsylvania*. 2 *State Laws* 3. On the assignment itself the assignee cannot bring an action against the assignor; but he may bring covenant, or, perhaps, an action 442
for money had and received, &c. 2 *Lord Raym.* 1242. 1419. But

1789. in respect to notes, a blank indorsement passes, as if payable to bearer; and every part of the statutes of *William* and of *Anne*, for giving negotiability to bills of exchange and notes of hand, has been introduced into this province from the earliest times.

For the Defendant, it was urged, that, at common law, bonds and notes were mere *choses in action*, and the assignee took them under all the equitable circumstances to which they were liable in the hands of the assignor. That promissory notes do not come within the law of merchants is clear; for, if they did, the statute of *Anne* would have been unnecessary. The question therefore, is, whether that statute has been extended to *Pennsylvania?* or, whether, by our act of Assembly, notes are put on the same footing with bills of exchange?

From the general rule of the extension of statutes, the 3 & 4 *Ann.* has not been extended; because it was passed subsequent to the settlement of *Pennsylvania*; because the province is not particularly named in it, nor would it, indeed, have been the policy of the *British* Legislature to promote the circulation of our paper credit; and because it has not been recognized and adopted by any positive act of Assembly. With respect to the introduction of the statute by practice, it operates no further than this, that the payee of a promissory note has brought an action on the note against the signer before our act of Assembly was passed; but till then, the indorsee could not maintain such an action; and obligations and promissory notes, are put on the same footing.

With respect to the act itself, that the Legislature could not intend to put promissory notes upon the same footing with Bills of Exchange, appears evidently from this consideration, that the preceding part of the act pursues the statute of *Anne*, nearly *verbatim*; but when it comes to that clause in the latter, which places notes on the same footing with Bills of Exchange, the act equally varies its spirit and expression: And, it is declared, that the assignee of a note, &c. shall recover *so much thereof as shall appear to be due at the time of the assignment, in like manner as the assignor could have done.*

The Chief Justice now delivered the opinion of the Court in the following manner:

M'Kean, *Chief Justice*——In pronouncing the opinion of the Court, on the point reserved for their consideration, I shall premise that Bonds, and Promissory Notes in writing, stood on the same footing at common law; and that the assignment of those instruments, as well as the form, operation, and effect of such assignment, depends entirely upon the municipal law of the place where it is made.

By an act of Assembly of *Pennsylvania*, passed on the 28th day of *May*, 1715, entitled "An Act for the assigning of Bonds, Specialties, and Promissory Notes," it is recited in the preamble, "that *it hath*
443 *been held*, that Bonds and Specialties under hand and seal, and Notes in writing, signed by the party who makes the same, whereby such party is obliged, or promises to pay unto any other person, or his order, or assigns, any sum of money therein mentioned are not *by*

law assignable or indorseable over to any person, so as that the person to whom the said Bonds, Specialties, Note or Notes, is or are assigned or indorsed, may, *in their own names*, by action at law, or otherwise, recover the same, &c." 1 *State Laws*, 77. 1789.

This, then, is conclusive as to the operation or effect of the assignment of a Bond, or the indorsement of a Note, previously to the passing of the act; for, no assignment, or indorsement, could take place *by law*, though it might in equity; and the assignee, or indorsee, could not, in any case, sue in his own name. The act, however, afterwards provides for such assignment and indorsement *toties quoties*: It also declares, that the person or persons to whom the assignment or indorsement is made, may in his, her, or their name or names, sue at law, "for the recovery of the money *mentioned* in the Bond, Specialty or Note, *or so much thereof as shall appear to be due* at the time of the assignment, *in like manner* as the person or persons to whom the same was, or were, made payable, might, or could, have done;" and that "the assignors shall not, after the assignment, have power to release any of the debts or sums of money *really due* by the said Bonds, Specialties, or Notes."

The question before the Court must be decided upon a just construction of the parts of the act of Assembly, to which I have just referred.

Throughout the whole of this act, Bonds and Promissory Notes are placed *exactly on the same footing*; except, indeed, that Bonds and Specialties are to be assigned under hand and seal, and in the presence of two or more credible witnesses: How, then, can the Court make any distinction or difference between assignees of the one, and indorsees of the other? They certainly may both sue *in their own names*, and respectively recover the money *mentioned* in the Bonds or Notes, assigned or indorsed, or so much thereof as shall be *really due* thereon, *in like manner* as the obligees, or payees, could have done; but, surely, this seems to be equally clear, that neither can recover more than what was *really due* at the time of the assignment or indorsement; in other words, no more than the original payees could have done prior to the transfer.

Before this act was passed, it appears, that actions by the *payee* of a Promissory Note, were not maintained, nor can they since be maintained, otherwise than by extending the *English* statute of 3 & 4 *Ann. c.* 9. *sect.* 1. Actions upon Promissory Notes were probably brought here, soon after the passing of the statute, by attornies who came from *England*, and were accustomed to the forms of practice in that kingdom, but did not, perhaps, nicely attend to the discrimination with regard to the extension, or adoption of statutes. I have no doubt, indeed, that many acts of Parliament, passed, not 444
only before, but subsequent to the union of *England* and *Scotland*, have, by the same means, been introduced and practised upon in *Pennsylvania*; and as experience has proved such proceedings to be beneficial, so constant and uninterrupted usage has given them a legal existence, that cannot now be shaken or destroyed. But the

1789. indorsees of Promissory Notes, according to the best information which we can obtain, have never grounded their actions against *the drawer*, upon any other basis than the act of Assembly now under consideration; though I think, the action by an indorsee, against *the indorser*, must be founded on the statute of *Anne*, and the usage under it, as no such action is given by the act.

The question, so far as it relates to the assignees of Bonds, has been determined in the affirmative, in the Supreme Court of *Pennsylvania*, before the revolution. *See ant.* 23. And, as, on the one hand, the Legislature has made no difference whatever between the assignees of Bonds and the indorsees of Notes, so, on the other, we cannot discover any solid or good reason to introduce a distinction in the particular before us.

Upon the whole, we are unanimously of opinion, that the indorsee of a promissory Note, does take it, subject to all equitable considerations, to which the same was subject in the hands of the indorser, the original payee. And, therefore,

Let the Defendant have a new trial.*

CUMMINGS, Assignee, *v.* LYNN.

THIS was an action of Covenant, and the circumstances under which it came before the Court, were these: The Plaintiff filed a declaration in the following words;

" *Joseph Lynn*, late of the county of *Philadelphia*, yeoman, was summoned to answer *James Cummings*, assignee of *James Campbell*, and *Stephen Kingston*, who were assignees of *George Turner*, of a plea that he hold with him the covenants and agreements of him the said *Joseph* with the said *George* made, according to the force, form, and effect of a certain deed thereof by him the said *Joseph*, with the said *George* made, &c. And thereupon the said *James Cummings* saith, that on the 6th day of *February*, in the year of our Lord, one thousand seven hundred and eighty-four, at the county aforesaid, a certain *Nicholas Eveleigh*, of the State of *South-Carolina*, by his certain obligation, or writing obligatory, sealed with his seal, and to the Court here shewn, whose date is the day and year aforesaid, acknowledged himself to be held and firmly bound unto a certain *Lewis Lestarjette*, in the sum of *three hundred and sixty-four pounds*,

* See 2 *Dall. Rep.* 194. *Stille v. Lynch.* Subsequent to the decision of *M'Cullough v. Houston*, an act was passed to render Notes negotiable, dated in the City or County of *Philadelphia*, and containing the words " without defalcation," &c. 4 *vol. State Laws*, *p.* 102. 3 *Dall. Edit.* And Notes or Bills discounted at the Bank of *Pennsylvania* were placed on the footing of foreign Bills of Exchange (except as to damages) by an Act passed the 30 March 1793. 3 *vol.* 329. It is not to be disguised, however, that the authority of *M'Cullough v. Houston*, has often been doubted in the argument of Counsel, and sometimes shaken by the opinion of the Court. In *Ludlow v. Bingham*, in *the High Court of Errors and Appeals*, *July* sessions 1799, Mr. SHIPPEN, the present *Chief Justice*, and Mr. ADDISON, then the president of a Circuit of Courts of Common Pleas, declared that a Note " expressed in commercial form was negotiable upon commercial principles," notwithstanding the case of *M'Cullough v. Houston*, and independent of the Act of Assembly. *M. S. S. Rep.*

" *twelve shillings*, sterling money, in gold or silver specie at the rate of 1789.
" *four shillings and eight pence* to the dollar, or *one pound one shilling and*
" *nine pence* to the guinea, to be paid to the said *Lewis*, his certain
" attorney, executors, administrators and assigns, when he should 445
" afterwards be thereto required. And the said *James Cummings*, in
" fact saith, that the same sum of money, or any part thereof, be-
" ing in no wise paid or satisfied, a certain *Joseph Parker*, for whose
" use and benefit the obligation or writing obligatory aforesaid, was
" made as aforesaid, afterwards, *to wit*, on the twelfth day of *May*,
" in the year of our Lord, 1784, at the county aforesaid, by his
" certain deed of assignment on the obligation or writing obliga-
" tory aforesaid, under his hand and seal duly made and executed,
" before two credible witnesses, did assign, indorse and make over
" the obligation or writing obligatory aforesaid, to the said *Joseph*
" *Lynn*, as by the same deed of assignment, to the Court here shewn
" appears. And the said *James Cummings* further in fact saith that
" the said *Joseph Lynn* afterwards, *to wit*, on the 8th day of *Sep-*
" *tember*, in the year last aforesaid, at the county aforesaid, the said
" sum of money, or any part thereof, being in no wise paid or satis-
" fied, by his certain deed of assignment on the said writing obligatory
" under his hand and seal duly made and executed, before two cre-
" dible witnesses, did assign, indorse, and make over the said obli-
" gation, or writing obligatory, to the said *George Turner* for value
" received of him. And the said *James Cummings* further in fact
" saith, that the said *Joseph Lynn*, in and by his said deed of assign-
" ment did covenant and agree to and with the said *George Turner*,
" and his assigns, that the sum of money aforesaid should be well and
" truly paid to the said *George Turner*, or his assigns, agreeably to
" the said obligation, or writing obligatory, as by the same deed of
" assignment to the Court here shewn appears. And the said *James*
" *Cummings* further in fact saith, that the said *George Turner* after-
" wards, *to wit*, on the 18th day of *November*, in the year last afore-
" said, at the county aforesaid, the said sum of money, being in no
" wise paid, or satisfied, did by his certain deed of assignment, on
" the said obligation or writing obligatory duly made and executed,
" under his hand and seal, before two credible witnesses, assign, in-
" dorse, and make over the said obligation or writing obligatory,
" to the said *James Campbell* and *Stephen Kingston*, and their assigns,
" for value received of them, and by the same deed of assignment
" the said *George* did then and there covenant with the said *James*
" *Campbell* and *Stephen Kingston*, and their assigns, that the said sum
" of money should be well and truly paid to the said *James Camp-*
" *bell* and *Stephen Kingston*, or their assigns, agreeably to the said ob-
" ligation or writing obligatory, as by the same deed of assignment
" to the Court here shewn appears. And the said *James Cummings*
" further in fact saith, that the said *James Campbell* and *Stephen King-*
" *ston* afterwards, to wit, on the eighteenth day of *December*, in the
" year last aforesaid, at the county aforesaid, the said sum of mo-
" ney being in no wise paid or satisfied, by their certain deed of
" assignment on the said obligation or writing obligatory duly made

1789. " and executed, under their hands and seals, before two credible " witnesses, did assign, endorse, and make over the obligation or " writing obligatory to the said *James Cummings*, and by the same " deed of assignment, the said *James Campbell* and *Stephen Kingston* " did then and there covenant, with the said *James Cummings*, that " the said sum of money should be well and truly paid to the said " *James Cummings*, agreeably to the said obligation or writing obli- " gatory, as by the same deed of assignment to the Court here shewn " appears. Yet the said *Nicholas Eveleigh*, or the said *Joseph Par-* " *ker*, or the said *Joseph Lynn*, or the said *George Turner*, or the said " *James Campbell*, or *Stephen Kingston*, the sum of money aforesaid, " or any part thereof, to the said *James Cummings*, although often " required, hath not paid, by reason whereof action hath accrued " to the said *James Cummings*, to demand and have the said sum of " money of and from the said *Joseph Lynn:* Nevertheless the said " *Joseph Lynn*, the same sum of money, or any part thereof, to the " said *James Cummings* hath not paid, although to do this the said " *Joseph Lynn* afterwards, *to wit*, on the 19th day of the same " month of *December*, in the year last aforesaid, at the county afore- " said, was, by the said *James Cummings* required, but the same to " him to pay hath hitherto refused, and still doth refuse, to the da- " mage of the said *James Cummings*, *One thousand pounds*, lawful mo- " ney of the State of *Pennsylvania*, and thereof he bringeth suit, &c."

The Defendant craved *Oyer* of the bond, condition, and assignments stated in the declaration, which was given in the following words:—

" *South Carolina.*

" KNOW all men by these presents, that I *Nicholas Eveleigh*, " of the said State, planter, am held and firmly bound unto *Lewis* " *Lestarjette*, merchant, in the full and just sum of three hundred " and sixty four pounds, twelve shillings, sterling money, in gold " or silver specie, at the rate of four shillings and eight pence to " the dollar, or one pound, one shilling and nine pence to the " guinea, to be paid unto the said *Lewis Lestarjette*, his certain attor- " ney, executors, administrators, or assigns: To which payment " well and truly to be made and done, I bind myself, and each " and every of my heirs, executors, and administrators, firmly by " these presents, sealed with my seal, and dated the sixth day of *Fe-* " *bruary*, in the year of our Lord, one thousand seven hundred and " eighty-four.

" THE CONDITION of the above obligation is such, that if the above " bound *Nicholas Eveleigh*, his heirs, executors, or administrators, " shall and do well and truly pay, or cause to be paid, unto the above " named *Lewis Lestarjette*, his certain attorney, executors, admi- " nistrators, or assigns, the full and just sum of one hundred, and " eighty-two pounds, six shillings, sterling money, in gold and sil- " ver specie, at the rate of four shillings and eight pence to the

" dollar, or one pound, one shilling and nine pence to the guinea, 1789.
" with interest from the date hereof, on or before the first day of
" *January*, which will be in the year of our Lord, one thousand
" seven hundred and eighty-five, without fraud or further delay,
" then the above obligation to be void and of non-effect, or else
" to remain in full force and virtue.

N. EVELEIGH." (L. S.)

Sealed and delivered
in the presence of
JOHN M'QUEEN.

" N. B. This bond is a renewal of an old debt contracted by Col.
" *N. Eveleigh* to Mr. *Jos. Parker*, for the above amount, in the year
" 1780. L. LESTARJETTE."

" I DO hereby assign all my right, title, claim, property, and
" demand of the within bond to *Joseph Lynn*, of the city of *Phila-*
" *delphia*, merchant, for his sole use and benefit, for value received,
" 12th *May*, 1784.

Witness. JOS. PARKER." (L. S.)
CROPLEY ROSE,
ALEXANDER MAJOR.

" I DO hereby assign at the request, and with the consent of
" the above signed *Joseph Parker*, all my right, title, claim, pro-
" perty, and demand, of, in and to the within bond, to *George Tur-*
" *ner*, of *Philadelphia*, for his sole use and benefit. Value received
" of him, this twenty-eighth day of *September*, 1784.

Witness. JOSEPH LYNN." (L. S.)
JACOB BAKER,
CAD. MORRIS.

" I DO hereby assign all my right, title claim, property, and
" demand of, in and to the within bond, to Messrs. *James Camp-*
" *bell* and *Stephen Kingston*, of *Philadelphia*, merchants, for their
" joint use and benefit: Value of them received, this eighteenth
" day of *November*, 1784.

Witness. G. TURNER." (L. S.)
ALEXANDER MAJOR,
HENRY M. VAN SLINGEN.

" We do hereby assign all our right, title, claim, interest, pro-
" perty, and demand of, in and to the within bond, to *James Cum-*
" *mings*, of *Charleston*, merchant, for his use and benefit: Value re-
" ceived in account with him, *Philadelphia*, 18th *December*, 1784.

JAMES CAMPBELL, (L. S.)
Witness. STEPHEN KINGSTON." (L. S.)
JAMES RANKIN,
ALEXANDER MAJOR.

1789. Upon this, the Defendant demurred for the variance between the covenants stated and assigned in the declaration, and the covenants appearing upon *Oyer* of the bond, condition, and assignments: And upon a joinder in demurrer, the question was brought before the Court, Whether this action of *Covenant* could be maintained on *Lynn*'s assignment? which was argued at the last term, by *Tilghman* and *Sergeant*, for the Defendant; and *Lewis* and *Ingersoll* for the Plaintiff.

For the Defendant, it was contended, in support of the demurrer, that the assignment by *Parker*, was not within the act of assembly, 1 *State Laws*, 77. for *Lestarjette* was the legal obligee, and *Parker* only the obligee in interest; and, as no suit could have been maintained in *Parker*'s name, arguments drawn from the act cannot apply to support the present action, but the assignment must be considered as made at common law.

That although *Turner* might have sued *Lynn*, yet, as it was only an equitable assignment, which is the case in respect to all *choses in action*, where positive law does not interpose, *Turner*'s assignee could not support such an action, 2 *Vez.* 181. 1 *P. Will.* 252. 2 *Black. Rep.* 1140. *Cro. J.* 179. The assignment is only an authority to receive the money; or, at most, a covenant, that, if *Lynn* received it, he would pay it to his assignee. There is nothing like an *express* covenant on the part of *Lynn*; though, relying on the word assigned, it will, perhaps, be contended, that there is an *implied* covenant. But that, (as it is already observed) is only an authority to receive the money; and the assignor can be guilty of no breach, unless he interferes with the recovery of his assignee.—1 *L. Raym.* 683. 3 *Keb.* 304. 2 *L. Raym.* 1242. 12 *Mod.* 553. 1 *Mod.* 113. The law, indeed, will make a covenant where a man contravenes his agreement, by deed under hand and seal. See 11 *Mod.* 171. *Cro. E.* 157. But no action of covenant has ever been brought in *England* by the assignee of a bond against the assignor, which furnishes a strong argument that no such action will lie; 1. *L. Raym.* 683. 12 *Mod.* 553. And there has been no judgment of any Court in *Pennsylvania* upon this point. The law is clear with respect to chattels in possession, that then an express warranty is necessary. 2 *Salk.* 210. 1 *Stra.* 459. See *Bull. N. P.* 272. Promissory notes are assignable to this effect by positive statute; for, at common law, the indorsee could not sue the indorser in his own name. See 1 *State Laws*, 77.

That, at least, due diligence ought to have been used to obtain the money from the obligor, as in the case of bills of exchange, or promissory notes, where a *demand* should not only be proved, but alleged, or it would be fatal on a writ of error. See *Doug.* In the present case no action was ever brought, nor any other attempt alleged to have been made for the recovery of the money, from the person who was originally bound to pay it.

For the Plaintiff, in answer to these objections, it was insisted, that the assignment was under the act of Assembly; and the following books were cited, 1 *Bac. Abr.* 527. 30. 2 *Com. Dig.* 560. *a.* 4. 2 *Black. Rep.* 1640. *L. Raym.* 442. 1 *Salk.* 133. That, by all the cases cited, it appeared, that the word *assigned* amounts to a covenant *that the money should be paid;* that it was immaterial whether the assignment was legally made to *Lynn*, or not; since, if he had assigned what he had not a right to assign, that would in itself be a breach to support an action of covenant; that a bill, originally negotiable, will be so in the hands of every indorsee, although the indorsement should not be to order. 1 *Black.* 295. 1 *Stra.* 557.—And that as this bond was assignable in its nature, by virtue of an act of Assembly, the Defendant, having undertaken to assign it, rendered himself liable in an action of covenant to every subsequent assignee. And that if a demand was at all necessary, it sufficiently appeared in the general allegation in the declaration. 1789.

The CHIEF JUSTICE now delivered the unanimous opinion of the Court:—That the assignment by *Joseph Parker* to *Joseph Lynn* was not an assignment according to the act of Assembly (1 *State Laws* 77.) but only a transfer of the equitable interest in the bond; and that *Joseph Lynn* could not by virtue thereof maintain an action against the obligor in his own name. The bond was payable to *Lestarjette;* and, although *Parker* might have released it, it could only at common law be sued or assigned by the former. See *Jenk. Cent.* 221. *ca.* 75.

That *Joseph Lynn*, the Defendant, only assigned his *equitable* interest in the bond to *George Turner*. It appears indeed manifestly by the previous assignment of *Joseph Parker* (which was equally known to *Turner* and to *Lynn*) that he had no other interest to assign. It is, therefore, the mere transfer of a *chose in action;* and, even if an action of covenant might have been brought by *George Turner* against *Lynn* on the word assigned; yet, no such action could be maintained against him by the present Plaintiffs, as *Lynn*'s assignment is not made to *George Turner* and *his assigns*.

That the covenant implied by the word *assigned*, extends only to this, that the assignee should receive the money from the obligor to his own use; and, if the obligee should receive it, that then the assignor would be answerable over for it.

BY THE COURT:—For these reasons let judgment be entered for the Defendant.

QUESNEL *v.* MUSSY.

THE Defendant was brought before the Court on a *Habeas Corpus*, when the following facts appeared:—That this suit

1789. had been instituted against him by Mr. *Vanuxem*, under the authority of a *special* Letter of Attorney from the Plaintiff, who resided in one of the United States; that the day after judgment had been obtained, another person arrived with a *general* Power of Attorney from the Plaintiff, and that this person, without consulting Mr. *Vanuxem*, settled with the Defendant, to whom he gave a general release in the name of his constituent. It appeared, also, that the latter Power of Attorney was only authenticated by proof of the hand writing of the party, and of the subscribing witnesses, before the Mayor of this city.

Lewis moved that the Defendant might be discharged by virtue of the release.

Du Ponceau objected, 1st, That the authentication of the *general* Power of Attorney was not agreeably to the act of Assembly: and, 2dly, That a *general* power is not a revocation of a *special* one.

Lewis answered, that the question was not, whether a general power is a revocation of the special one; but whether it was a sufficient authority for granting the release. Of this, he said, there could be no doubt; and, with respect to the mode of authentication, he observed, that the act of Assembly relates only to powers executed in a foreign country, and leaves the matter here to common law proof.

THE COURT were of opinion, that the *general* power was sufficient for the purpose of the release; and having directed the person acting under it, to enter an acknowledgment of satisfaction on the record, they ordered the Plaintiff to be discharged.

HOOTON *v.* WILL.

DOMESTIC ATTACHMENT.——This cause being removed by *Certiorari* from the Common Pleas, now came before the Court on the following case, stated for their opinion:

"The term of *September*, in the *Common Pleas* for the county of "*Philadelphia*, in the year of our Lord 1782, began on the 4th day "of *September*, and on the 16th day of *September*, in the same year, "Judgment was entered in the Court aforesaid, in an action then "depending at the suit of the Plaintiff, above named, against *John* "*Levinz*, which action had been brought to the term of *June*, in "the same year. On the 5th day of the same month of *September*, "a *Domestic Attachment* issued out of the same Court, at the suit of "*John M'Farland* against the said *John Levinz*, and was served on "the lands of the Defendant on the same day at 11 o'clock in the "morning. No auditors were ever appointed, nor any other pro-"ceedings had, under the said attachment, until a similar case was "stated for the opinion of the Court of *Common Pleas* for the coun-"ty aforesaid, the 9th day of *November*, in the year of our Lord

"1784.* At the time of rendering the Judgment aforesaid, the said 1789.
"*John Levinz* was seized of the aforesaid lands in fee, and so con-
"tinued until the same were sold under the same Judgment, by
"the said *William Will*, as Sheriff of the county, in whose hands
"the money remains.

"The question submitted to the Court is, whether the said *Ben-*
"*jamin Hooton*, or the said *John M'Farland*, is entitled to receive
"the money from the Sheriff?

The case was argued at the last term, by *Lewis*, for the Plaintiff, and *Ingersoll*, for the Defendant, when two questions were made;—1st, Whether *Hooton*'s Judgment related to the first day of the term, so as to exclude the *Domestic Attachment*, in his favour: And 2dly, Whether the *Domestic Attachment*, for want of the regular continuances, was not out of Court?

Lewis contended, 1st, That the act of Assembly, and *English* statute, with respect to docketing Judgments, extend only in favour of subsequent purchasers for a valuable consideration, 1 *State Laws* 463. 3 *Black. Comm.* 420. 14 *Vin. tit. Judgment* 616. *Cro. C. Hetl.* 72. *S. C.* under the Bankrupt Laws there is a relation to the time of the act of bankruptcy; and yet the legal relation of a judgment to the first day of the term, was held sufficient to defeat the claim of the Commissioners. *Sid.* 271. *Skin.* 257.

2dly, That from the case stated, it does not appear that Auditors have been appointed under the *Domestic Attachment*. This, however, is not so material, as that there is no continuance of the cause. There is not, indeed, any law which directs a Judgment in a *Domestic Attachment*; but since on the report of the Auditors, the business is to be settled, till that is done, it is necessary to continue the action; as in the cases of a writ of *Partition*, and an action of account. See 1 *State Laws* 121.

Ingersoll, on the *first* point, adverted to the opinion of the Court of *Common Pleas*, (see *ant.* 187) and urged that the *Domestic Attachment* Law, 1 *State Laws* 126. was to be considered as applying to an insolvent debtor, the great outlines of law with respect to a bankrupt. From the moment that the attachment is in the hands of the Sheriff, the property ceases to be the Defendant's, and must be disposed of agreeably to the act. See *Comb.* 33 *Skin.* Under a commission of Bankrupts, which is thus analogous to the *Domestic Attachment*, creditors are to be considered as purchasers, and nothing can exclude a general distribution, but an execution executed. See *Co. Bank. Law.* Fictions, indeed, ought never to be allowed to work an injury; but if the technical relation of a Judgment to the first day of the term, were suffered in a case of this nature, all the expence and trouble of a *Domestic Attachment* would be rendered oppressive and nugatory.

* See the case, *ant.* 187. The opinion given in the Court of *Common Pleas*, was only upon the first point made by the Plaintiff's counsel, merely I believe, at the time of the argument) but no judgment was regularly pronounced.

1789. 2d. With respect to the *second* point, the act of Assembly as to the appointment of auditors, is merely directory; and continuances are matters of mere form, which may be entered at any time; so that the Court will even presume it to have been done. 2 *Har. C. P.* 312. 1 *Stra.* 139. 2 *Barn. Not.* 172. 1 *Stra.* 136. 1 *Sid.* 53. 60.—See 18 *Vin. tit. Purchaser. Preced. in Chan.* 478. *Schlosser vs. Lesher, ant.* 411.

Lewis, in reply, still urged, that the acts for docketing Judgments, and recording Deeds, were only made in favour of purchasers, and although, generally speaking, every man who does not take by descent, is called in law, a purchaser, he contended, that the object of those acts was not of that general import, but merely to secure persons who had paid an actual and immediate consideration for the premises, and not to aid those who, by process of law, were endeavouring to recover an antecedent debt, which was the case in a domestic attachment. The attachment when levied is binding between the parties; but it does not affect the legal relation of a Judgment obtained by another person; and the case cited from *Co. B. L.* is that of an execution taken out, but not levied. See *Prec. in Chan.* 478.

With respect to the omission of continuances, he answered, that if there was any thing to enter them from, and day has been given to the Defendant from time to time, then the doctrine and authorities of the adverse Counsel would apply. But, he insisted, that where day was given to the Defendant, and, afterwards, nothing was done in the cause, the continuances could not be arbitrarily entered in the manner suggested by the Defendant's Counsel.

After consideration, THE CHIEF JUSTICE delivered the opinion of the Court, in which he declared, that he and his brethren were unanimously of opinion with the Plaintiff, on the case stated; and directed Judgment to be entered accordingly.

Judgment for the Plaintiff.

PRIMER, Plaintiff in Err. *v.* KUHN.

ERROR from the *Common Pleas* of *Philadelphia* County. On the trial of the cause below, (See *ant.* 225) a bill of exceptions was taken to the opinion of the Court in the following words:

"Trespass *sur le case*, in the *Common Pleas*, *Philadelphia* County: "and now the 6th day of *February* 1788, upon the trial of this "cause, the Counsel for the Defendant, under the Pleas of *Non As-* "*sumpsit*, payment, and defalcation, and, in order to maintain the "same issue, offered to give in evidence a certain bond, or obliga- "tion of the said *Ludwig Kuhn* (*prout* obligation) assigned (*prout* "assignment) entered into by the said Plaintiff, before his discharge "under the Insolvent Act, and prayed that the monies thereon

" due might be defalked against the said *Ludwig Kuhn*'s demand, 1789.
" which it was argued, had commenced after his said discharge.
" To this the Counsel for the Plaintiff objected, and prayed the
" Court not to admit the same obligation and assignment thereof in
" evidence; to which the Court assented, and over-ruled the testi-
" mony. Whereupon the said Counsel for the Defendant, did,
" then and there, on behalf of said Defendant, except to the said
" opinion of the Court, and did then and there request of the said
" Court to put their seals to this bill of exceptions, which was
" granted accordingly."

To the bill of exceptions a memorandum was subjoined by the Counsel, on both sides, stating, that the Plaintiff below had notice of the bond and assignment before the suit brought, but not before the sale and delivery of the goods by him to the Defendant.

The refusal of the Court of *Common Pleas* to permit the bond and assignment, to be given in evidence, was the error now alleged; and, on the 26th of *September*, the case was argued by *Levy*, for the Plaintiff in Error, and *Sergeant*, for the Defendant.

Levy. Before the acts of Assembly are particularly examined, it may be proper to consider some of the inconveniences that existed, in such cases, at common law. Goods delivered in part might, *perhaps*, be given in evidence in an action of *Assumpsit*, by way of mitigating the damages, but not under a plea of payment to a specialty; nor could the Defendant discount any note, bill, bond, recognizance, or judgment entered into by, or obtained against, the Plaintiff. This necessarily multiplied suits and costs; and, it often happened, that a Plaintiff, in desperate circumstances, recovered against a Defendant to whom he was, in fact, indebted in a greater sum. If, indeed, by accidental circumstances, his action was brought to a conclusion, earlier than the Defendant's cross action, he might receive the money, and for his larger debt, become utterly insolvent by the time the Defendant had obtained a judgment.

Inconveniences of this kind have been perceived by the Legislature, or judicial power, of the most enlightened nations, and a remedy, in a greater or less degree, provided. See *Lord Kaim Prin. of Eq.* 201. 2. 3. 4. 5. and, in *England*, even before the statutes had given relief in the Courts of Common Law, the Courts of Equity *endeavoured* to provide for such cases. *Show Ca. in Parl.* 17. 1 *Vern.* 121. 2. 2 *Vern.* 428. 9. *Case* 390. 2 *P. Will.* 128.

In *Pennsylvania* there are two acts of Assembly that treat of this subject, 1 *State Laws* 48. and *Ibid* 165. It is observable that the first general provision by the former act, passed in 1705, was twenty-two years previous to the first general provision of the same nature in *England*, which was not till the 2 *Geo.* 2. *c.* 22 *sect.* 13. The *latter* act of Assembly, however, is copied, *almost verbatim*, from the 2 *Geo.* 2. *c.* 22. and is posterior in point of time.

These two acts of Assembly, made in *pari materia*, are, then, to be considered as remedial laws, and must receive a liberal construc-

1789. tion : And, as they declare, that where two are indebted to each other, they may set off their demands, it only remainsto investigate the objections which are urged against the defalcation contended for, on behalf of the Plaintiff in error.

The Plaintiff below, in effect, says, that he has obtained the benefit of the insolvent act ; and, if he is compelled to pay, or allow, this bond in discount, his property is taken away to pay his old debts. This is true ; but, it is to be answered, by remarking, that the very insolvent act, on which he relies for the protection of his person, makes his future effects liable for debts preceding his discharge ; and herein consists the well known distinction between bankruptcy and insolvency. See 1 *State Laws* 164. *sect.* 7. *Jenk. Cent.* 256. *Case* 49. This was the condition upon which he obtained his liberty ; and, having obtained it, shall he be thus allowed to evade the condition ? As, upon an execution against him, his effects would be liable, it can make no odds to him, in point of justice, whether his creditor obtains payment by a cross suit, or by defalcation. By the former mode, indeed, he might have an opportunity of secreting his effects the moment that they were recovered in the action brought by him, and thus prevent his creditor from deriving any benefit by a subsequent judgment and execution. Such practices, however, have been too frequent to escape notice, and are too flagrant to be countenanced and supported in a Court of Law. Besides, the right of set-off is far more material against an insolvent debtor than any other person ; for it is contrary to conscience that he should recover against those to whom he is, in truth, indebted in an equal or larger sum. 2 *P. Will.* 129.

But, the Plaintiff below may also urge, that the Plaintiff in Error is *an assignee with whom he never dealt.* See 1 *State Laws* 48. and, endeavour to establish an analogy between his case, and that of a debt due to a man in right of his wife, which cannot be set off in an action against the husband on his own bond. *Bull. N. P.* 179. The reason, however is essentially different. What is due to a husband in right of his wife, he must sue for in the name of *himself and wife ;* and, as discount is in the nature of a suit, to permit the set-off in the case alluded to, would be adding a *party* to the suit, that is the wife, who was not named in the writ. Besides, debts due to the wife are not absolutely vested in the husband ; for, if he does not reduce them into possession, they survive to her, and do not go to his executors.

But the *second* act of Assembly does not say any thing with respect to the party's *dealing together ;* and even if there were any force in an objection grounded on those words, the answer would be easy, that the assignee of *a negotiable, or assignable instrument,* is as much contracted with by the words of the obligation, "*and his assigns*" as the original obligee; and, under the act of Assembly he is equally the "*creditor*" of the obligor. See 1 *State Laws* 165.

To illustrate this argument, suppose that C gives his bond to D, which D assigns to A: A gives his bond to E, which E assigns to C. A then sues C. They are both assignees: What motive of policy, what principle of construction, could in this case, preclude a discount? It is the object of law to put an end to strifes; and the Courts of Justice are ever anxious to prevent an unnecessary circuity of action. Under the statute of 2 *Geo.* 2. which is in the same words with the acts of *Pennsylvania*, the Judges of *England* have permitted an indorsement after the suit brought to be discounted; the practice requiring only that it shall be proved to have been made "*before plea pleaded.*" *Cromp. Pract.* 161. And the case in 2 *Strange* 1234, makes no question, whether an assignee may discount, but merely turns upon the time of indorsement. 1789.

The objection, that the allowance of such accounts would be the means of preventing insolvent debtors from obtaining a subsistence, goes much too deep: it is considering inconveniences arising on a question which clear and positive law has determined; for, the act of Assembly says that the future effects of an insolvent debtor shall be liable to the payment of his old debts; and the Judges of the Courts of Common Law have extended the principle of discount, by a most liberal equity, far beyond the words of the statute in *England.* 2 *Bl. Rep.* 869.

Sergeant, for the Defendant in Error, contended, that the attempt to pay for goods, by the bond of an insolvent debtor, purchased at five shillings in the pound, or, perhaps obtained without any consideration, was in itself an act against conscience; that no case could be shewn of a discount allowed upon an indorsement made after the action brought; for, *Cromp.* 161. is not a sufficient authority; that the rule of retaining, where there are mutual debts, did not apply; and that a set off must be of a demand in the Defendant's own right. He cited 8 *Vin.* 557. *Bro. (Debt) pl.* 172. *Ibid. (Condition) pl.* 181. *S. C.* 1 *State Laws* 48. 3 *Black.* 304. 2 *Geo.* 2. *c.* 22. 8 *Geo.* 2. *c.* 24. *Bull. N. P.* 179.

On the 3d of *October* THE CHIEF JUSTICE, after stating the case, delivered the opinion of the Court to the following effect:

M'KEAN, *Chief Justice.* As a discharge under the insolvent laws, while it exempts the person from future molestation, leaves the effects of the Defendant for ever liable to the demands of his creditors, the discharge obtained by the Defendant in Error can have no operation in the decision of this cause.

A question has been made, whether the Plaintiff in Error might have defalked his bond under the *English* statutes; the first of which takes notice of mutual debts, &c. The Judges there were, indeed, of opinion, that only debts of the same dignity could be set off; but for this, I can discover no good and satisfactory reason; and a remedy was afterwards provided by a subsequent statute, which declares, that debts of different natures may be defalked.

The true ground, however, for the decision of this cause, arises from the construction of the several acts of Assembly for the relief

1789. of insolvent debtors, for the assigning of bonds, and for defalcation: And the last of these acts says, that "if two or more, *dealing together*" (which words are not to be found in either of the *English* statutes) be indebted to each other upon bonds, &c." when an action is commenced, the Defendant may plead payment, and give his bond, &c. in evidence against the Plaintiff's demand.

If then, the obligee could have defalked the bond in question, (of which, we think, no doubt can reasonably be entertained) and he has legally assigned all his right and interest in it to the Plaintiff in Error, why should not the assignee be entitled to the same advantage, since the act for the assignment of bonds has placed him on the same footing?

There is another clause in the defalcation act, which provides, that where a Plaintiff and Defendant have *accounts* to produce one against another, they may refer them, and the report of the referrees shall have the effect of a verdict: Now, although the words are confined to the case of *accounts*, yet the construction of the act has liberally extended the right and benefit of such a referrence, to every other cause of action.

For the sake of justice, and to prevent an odious multiplication of suits, we think, that the same liberality should be exercised in the case before us; and are unanimously of opinion, that the Judgment of the Court below ought to be reversed.

Judgment reversed.

GRÆME *et. al.* Adm'ors, *v.* HARRIS.

THIS Cause came before the Court on a case stated, which was, in substance, as follows:—The intestate, *John Græme*, in his life time, to wit, in *December* term 1772, obtained a Judgment against the Defendant, in a plea of debt, in the County Court of *Common Pleas* of *Philadelphia*. He afterwards died, being resident at the time of his death in *Great-Britain*, of which kingdom he was a subject. Upon his decease the Plaintiffs obtained Letters of Administration from the Archbishop of *York*, in the said kingdom, which bore date the 25th of *June* 1784; but to this action, which was a *scire facias* to revive the above-mentioned Judgment, the Defendant pleaded, that the Plaintiffs never were Administrators: Issue was thereupon joined; and this question submitted to the opinion of the Court, whether under the authority of the Letters of Administration granted by the Archbishop of *York*, the Plaintiffs could maintain the present action?

The point was argued on the 26th of *September*, by *Rawle*, for the Plaintiffs, and by *Sergeant* and *Swift* for the Defendant.

Rawle relied on the act of Assembly, which declares, that Letters of Administration granted out of the Province were sufficient for the

purpose of bringing actions. *State Laws*, 30. He urged, that this law, as well as other laws of the province, was recognized and confirmed by the act of the 28th of *January*, 1777; that such letters of administration were a competent authority by the law of nations; *Godb.* 33. 47. and that it had been determined in a sister State, that letters of administration granted in *New-York*, were sufficient to maintain actions in *Connecticut*. *Kirb. Rep.* 270. 1789.

Sergeant and *Swift* contended, that the necessary operation of the Revolution, had altered the law declared in the act of Assembly, and the words "*out of the province*," were evidently meant of places within the *British* dominions. They urged, that this was an attempt to give more force to the letters of administration, than they would be entitled to even in the *British* dominions; for, if there were *bona notabilia* in *England*, and in *Ireland*, letters of administration must be taken out in both kingdoms. 2 *Bac. Abr.* 399. 11 *Vin.* 59. pl. 6. *ibid.* 74. pl. 1. or, even if there were *bona notabilia* in two different provinces, as *Canterbury* and *York*, letters of administration must be granted in each. *Palm.* 163. The arguments *ab inconvenienti*, are likewise in favour of the Defendant; for, if this authority is good, the creditors of the intestate must pursue the administrators in *England*, or any foreign country, where the law differs with respect to the priority of debts. Besides, the security given by administrators, is only with relation to the apparent value of the personal estate where administration is granted.—See 2 *State Laws* 41. *Art. of Confed. art.* 4. *Const. Penn. sect.* 34.

The Court, having considered the case and arguments, were unanimously of opinion, that the letters of administration, granted by the archbishop of *York*, were not a sufficient authority to maintain an action in this Commonwealth; and gave

Judgment for the Defendant.

BUNNER *v.* NEIL.

THIS cause was removed by *Habeas Corpus* from the Court of *Common Pleas* of *Philadelphia* County, and, on the trial a verdict was found in favour of the Plaintiff, for £. 4. 10. 8, which the Defendant paid to the *Prothonotary*, and then moved to stay proceedings, contending, that as the Plaintiff's demand was reduced below £. 10. by a direct payment, and not by discount, or set off, the Plaintiff must pay the costs.

The Plaintiff, on the other hand, obtained a rule to shew cause, why the Defendant should not pay double costs, under the act of Assembly, which provides, that, if the Defendant removes the cause, and a sum under £. 50. is found for the Plaintiff, the Defendant shall pay double costs.

1789. After argument, by *Swift*, for the Plaintiff, and *Tilghman*, for the Defendant, the rule to stay proceedings was made absolute; and the rule for payment of double costs was discharged.

THOMPSON, Plf. in Err. *v.* MUSSER: Two Actions.

THESE actions were removed by writs of Error from the *Common Pleas* of *Lancaster* County; and, on return of the respective records, the proceedings appeared to have been as follow:

1. On the *first*, or *larger*, record, it appeared, that a *Capias* in an action of *Debt in the Detinet*, issued at the suit of *John Musser* against *John Thompson*, for 200,000 weight of tobacco; and the declaration set forth a penal bill, dated the 3d of *January*, 1784, by which *John Thompson* binds himself *in the penalty of* 200,000 weight of net crop tobacco, of the inspection of *Fredericksburgh*, or *Falmouth*, on *Rappahannock* river, in *Virginia*, to pay 100,000 weight of tobacco, of the same inspection, to *John Musser*, or his assigns, as soon as it could be collected of those who are indebted to the said *John Musser*, and the Obligor; but the said *John Thompson* agrees, that, in case it cannot be collected, or obtained, he will be answerable for the same."—After *Oyer* of the bill, the Defendant pleaded *payment*, the Plaintiff replied *non solvit*, and thereupon issue was joined.

The cause was tried at *Lancaster*, on the 7th of *December*, 1786, when the Plaintiff below gave in evidence the penal bill stated in the declaration, upon which an indorsement was made and subscribed on the 25th of *May*, 1785, that "it was agreed by the parties, that the within tobacco should be settled at the current price at *Fredericksburgh*, on the 1st of *May*, 1784; at which time the within bond is considered due, and is to carry interest from the date." There was, likewise, a receipt on the back of the bill, signed by *Musser*'s attorney in fact, on the fifth of *July*, 1785, acknowledging that he "received the within bill in full."

On behalf of the Defendant below, two indentures were given in evidence, from which, it appeared, that the Plaintiff and Defendant had entered into a copartnership, for carrying on an inland trade during a limited period; and on the indenture last made between them, a memorandum was endorsed, dated the 3d of *January*, 1784, setting forth the receipt of the two penal bills, on which the present actions were brought, and declaring that the same, when paid, were to go in discharge of what was due from *Thompson* to *Musser*. Several letters were read from the latter to the former, in which it was confessed, "that *Musser* had no other claim, but upon these bonds, against *Thompson*, and that every pay-

ment, which had been made since they were given, was on their account. The payment of a note for £. 46. was then proved, and an agreement, which had been entered into by *Musser*, that "on the payment of £. 450 specie, and the remainder that may appear due in warrants on the Treasurer of the State of *Virginia*, which are received there in taxes at par, or equal to gold and silver, allowing *Musser* at the rate of 12½ per *cent.* on the whole amount of the said warrants, the same shall be a sufficient discharge of the bill." To prove the payment of *Virginia* warrants, according to the terms of the foregoing agreement, a receipt was produced from *Musser*'s attorney, dated the 5th of *July*, 1786, to this effect: "Received from *John Thompson*, £. 1668 11 6⅞ *Virginia* currency in warrants on the Treasury of *Virginia*, which is ettled in specie, at £. 1484 4 4. *Virginia* currency; being in full payment of his bond to *John Musser*, dated the 3d of *January*, 1784, for 100,000 weight of net crop tobacco, of the inspection of *Fredericksburgh*, or *Falmouth*, in *Virginia*." And, in order to shew that the warrants thus paid, were receivable in taxes, at par, or equal to gold and silver, the Counsel for the Defendant below, offered to read an act of the Legislature of *Virginia*, (which contained a recital of a preceding act) on that subject, from a pamphlet, stitched in blue paper, with the following title page:—"Acts passed at a General "Assembly of the commonwealth of *Virginia*, begun and held at "the public buildings in the city of *Richmond*, on Monday the "3d day of *May*, in the year of our Lord 1784.—*Richmond*: Printed "by *John Dunlap*, and *James Hayes*, Printers to the Common-"wealth." But the reading this act being objected to, on the ground, that it was not legally authenticated, the Court over-ruled the evidence; and a *Bill of Exceptions* to their opinion was tendered and allowed. 1789.

The Jury gave a verdict for *Musser*, saying, that "They find "114,236 weight of net crop tobacco, of the inspection of *Fre-"dericksburgh*, or *Falmouth*, on *Rappahannock* river, to be due to "the Plaintiff from the Defendant, value £. 2000, with sixpence "damages and sixpence costs." Whereupon judgment was entered generally.

II. On the *second*, or smaller, record, it appeared, that an action of *debt in the detinet*, for 200,000 weight of net crop tobacco, of the inspection of *Richmond*, or *Petersburgh*, in *Virginia*, was brought on another penal bill of the same date, by which "*John Thompson* binds himself in the penalty of 200,000 weight of tobacco, to pay to *John Musser*, 100,000 weight of tobacco, of the last mentioned inspection, at or before the 1st of *May* next ensuing the date of the bill." The pleadings were the same in this, as in the preceding case; but the declaration being erroneously for tobacco of the inspection of "*Fredericksburgh*, or *Falmouth*, in *Virginia*, on *Rappahannock* river," the Plaintiff's Counsel, after the Jury were sworn, moved to amend the declaration, agreeably to the tenor and pur-

1789. port of the writ, by striking out those words, and inserting, "*Richmond*, or *Petersburgh*;" which the Court allowed, without the consent of the Defendant, and directed the same Jury to be again immediately sworn for the trial of the cause. This being done, and the Jury gone from the bar, the attornies of both parties, signed an agreement, that, "as it was then very late, the *Prothonotary* of the Court might receive the verdict, and that, if necessary, they would afterwards mould it into form."

The verdict then finds, "17,853 weight of net crop tobacco, of the inspection of *Richmond*, or *Petersburgh*, in *Virginia*, to be due to the Plaintiff from the Defendant, on the bill aforesaid, and the true value thereof to be £. 446 6 6. *Pennsylvania* currency, with sixpence damages, and sixpence costs:" Whereupon judgment was also entered generally.

Upon these records the general errors were assigned, and *in nullo est erratum* pleaded in both causes. They were argued together, first at *Lancaster*, and afterwards, in two different terms, at *Philadelphia*, by *Bradford*, *Lewis*, and *Wilson*, for the Plaintiff in Error; and by *Chambers*, *Hartley*, *Yates*, *J. B. M'Kean*, *Sergeant*, and *Ingersoll* for the Defendant.

The specific errors alleged against the *first* record, were four:

1st. That the declaration is for the penalty in a penal bill, but it omits to state, that *John Thompson* did not pay the smaller quantity of 100,000 weight of tobacco, or a certain sum of money in lieu thereof, on the day fixed for the payment; so that no cause of action is shewn to have accrued to the Plaintiff below for the penalty.

2d. That this being an action of *debt in the detinet*, the verdict is erroneous, because it finds 114,286 weight of tobacco to be due to the Plaintiff from the Defendant, and the true value thereof to be £. 2000, which they find of debt, &c. because the finding, being of so much tobacco due to the Plaintiff, is not an express determination of the issue, which is *solvit* and *non solvit*; and because the finding is not of all that was in issue, since the declaration is for 200,000 weight of tobacco, but the verdict is only for 114,286, and nothing is said of the rest.

3d. That the judgment is erroneous, because, ensuing the nature of the verdict, it is for the value of the tobacco in money, and not for the tobacco itself; or, if that cannot be had, for the value thereof in money.

4th. That the Court below were in an error, in over-ruling the evidence of the printed copy of the act of Assembly of *Virginia*, which purported to have been printed by the law printers of that Commonwealth, respecting the nature and value of Treasury warrants, or certificates.

The *second* and *third* of these errors were also alleged and applied against the *smaller* record, with an additional exception, to wit,—That after the Jury had once been sworn, the Court, without the consent of the Defendant below, discharged them, per-

mitted the Plaintiff to amend his declaration, swore the Jury again, and neither gave the Defendant an imparlance, nor ordered the Plaintiff to pay the costs occasioned by his faulty declaration. 1789.

The causes being held under advisement for a considerable time, in hopes that a compromise would take place between the parties, THE JUDGES now delivered their opinions separately and at large.

M'KEAN, *Chief Justice*—The arguments on the records before the Court, have been ably and learnedly enforced To these, and to the authorities produced on both sides, I shall briefly refer, while I consider in their order, the objections that have been made in favour of the Plaintiff in Error.

1. In support of the *first* objection, a variety of precedents have been shewn of declarations upon penal bills from 1 *Mod. Ent.* 180. 281. *Brown's Mod. Intrandi, &c. &c.* and the following books were cited: *Doug.* 658. 8 *Co.* 133. 4 *Bac. Abr.* 13. 7 *Co.* 10. *a.* 4 *Bac. Abr.* 16. 363. 5 *Bac. Abr.* 321. 1 *Cro. E.* 548. 2 *Cro.* 183. 500. *Cro. C.* 515. *Hob.* 82. 232. 12 *Mod* 81. 1 *Bulstr.* 163. *Salk.* 662. 2 *L. Raym.* 814. *Carth.* 322. *Doctrin. Placit.* 329. *Co. Litt.* 303.

But the Counsel for the Defendant in Error have answered these cases, by urging, that *Oyer* of the penal bill was prayed and granted; that the Defendant below pleaded in chief to the declaration, *payment*, and joined issue; and that the *verdict* was for the Plaintiff below. They contended, that the Plaintiff was only bound to prove the gist of the action; that it was not incumbent on him to prove that the smaller quantity of 100,000 weight of tobacco was *not* paid; that under the act for defalcation (1 *State Laws* 48.) the Jury are to find the sum really due; and that the defect, if it was one, is cured by pleading over in chief, and, also, by the verdict. In corroboration of these positions, they cited, *Doug.* 658. 8 *Co.* 133. *Vaugh.* 93. 4. 5. 4 *Bac. Abr.* 19. 16 *Hob.* 199. 1 *Lill. Pract. Reg.* 418. *Cro. C.* 209. 5 *Com. Dig.* 57. 58. 60. 1 *Mod.* 169. 1 *Salk.* 37. 38. 133. 8 *Mod.* 356. 1 *Lev.* 190. 12 *Mod.* 44. *Cro. I.* 668. *Tri. per pais.* 289. 290. 306. 307. 368. *Cro. Car.* 515. *Cro. E.* 68. 12 *Mod.* 459. 414. *Carth. Rep.* 80. 94. 2 *Will.* 380. *Cowp.* 407. 1 *Stra.* 233. 2 *Stra.* 925. 1006. 1011. 1 *Will.* 255. 1 *Salk.* 9. *Bull. N. P.* 147. 148. 3 *Black.* 410. *Barr. on Stat.* 193. 2 *Black.* 406. 1 *Vent.* 108. 114. 122. 156. 1 *Com. Dig.* 60. 2 *Vent.* 153. *Keelw.* 187. b. 7 *Rep.* 10. *a.* 9 *Vin. Abr.* 599. *pl.* 1. 10 *Vin. Abr.* 3. *pl.* 1. 16 & 17 *Car.* 2. *c.* 8.

We are clearly of opinion, that this defect in the declaration, with respect to the averment, cannot now be taken advantage of as an error. It might indeed, have been fatal on demurrer; but, at this period of the cause, it is cured by the plea in bar, by the verdict, and by the statutes of *Jeoffails*. The Defendant below pleaded payment, which admits the declaration to be good. 10 *Vin. Abr.* 3. *pl.* 12. The penal bill became a part of the record by the *Oyer*; and if the Jury had not been satisfied, that the smaller quantity was

1789. not paid, they would never have given a verdict for 114,286 weight of tobacco. This was the very thing litigated and determined; and it was the province of the Jury, under the act of defalcation, to ascertain the balance, which must have appeared from the evidence. The verdict, therefore, also aids the omission of the averment. See 3 *Black. Com.* 394. *Carth.* 389. *Jenk. Cent.* 21. *ca.* 39. *Ibid.* 288. *ca.* 24. Several of the cases cited on both sides do not apply; but all the late authorities (many of which are in point) support our judgment on this occasion. Those cases which bear a contrary aspect, occurred before the last of the statutes of *Jeoffails*, and previous to the more liberal decisions of modern Judges. 2 *Burr.* 756. The general rule, however, is now well established, that if a Plaintiff states his title in his declaration in a defective manner, it will be cured by a verdict; but not so, if the title is totally defective in itself. *Cro. E.* 778.

2. The *second* objection is to the verdict; and to prove the invalidity of that, the Counsel for the Plaintiff in Error, have cited, *Cro. J.* 681. *Yelv.* 71. 2 *Roll's Abr.* 693. *tit. Verdict*, *pl.* 5. *Vaugh.* 75. 4 *Com. Dig.* 145. 1 *Inst.* 227. *Cro. Jac.* 31. *Cro. E.* 133. 2 *Stra.* 1089. 2 *L. Raym.* 1581. 3 *Lev.* 55.

To this the Defendant's Counsel have replied, that strict form in a verdict is not now required; that it needs only to be understood what the intention of the Jury was, agreeably to which the verdict may afterwards be moulded into form; that the constant practice in all the Courts in this State, as well before as since the Revolution, has been to enter the verdicts on the issue of *non solvit* in the manner that has been used in the present case; that the intention of the Jury is plain; and that the mode of entering their verdict is the act of the Clerk.—*Hob.* 54. *Co. Litt.* 227. *a. Salk.* 328. *pl.* 2. 2 *Lill. Abr.* 798. 4 *Bac. Abr.* 58. 59. 99. 5 *Bac. Abr.* 297. 298. 314. 2 *Burr.* 700. *Cro. E.* 664.

The Court, concurring in these reasons, cannot allow this exception.

3. That the judgment is for money, and not for the tobacco itself, or, if that cannot be had, then for the value thereof, makes the *third* objection; in support of which the following books are cited: *Yelv.* 71. 8 *Vin. Abr.* 41. *pl.* 15. 17. 18.

But it is contended on the other side, and such is the opinion of the Court, that if the verdict is good, the judgment must likewise be so; for being entered generally, when it is drawn at large, it may be put into form; and the merits having been tried, justice must be obtained without being entangled in technical niceties.—*Cro. J.* 502. 6 *Mod.* 270. 1 *Wils.* 1. 2 *Stra.* 931. 1013. 1 *Sid.* 376. 5 *Mod.* 227. 1 *Vent.* 119. 2 *Wils.* 380. *Cowp.* 407.

4. The *last* error assigned in this record, respects the refusal of the Court of *Common Pleas* to admit the Defendant below to read in evidence, a copy of an act of Assembly of the State of *Virginia*, printed by the Law Printers there, and stitched up, with a few other acts, in a blue paper cover.

To maintain this objection, it has been argued, that in *Great-Britain* a *public* act of Parliament is proved by the printed statute book; that a general history is a proof of a general transaction, though not of a particular one; that this is a *general* act, and promulgated in the usual mode of promulgating the laws of *Virginia*; that by the fourth article of the late Confederation, the Courts are obliged to take notice of the acts and proceedings of other states, as much as if they had occurred here; and that the ordinances of *France*, the laws of the *Danish* islands, proclamations in our sister States, the statutes of *England*, *Ireland* and *Scotland*, heralds' books, and registers, have frequently been read in evidence in this Court, *because of their public notoriety*. 12 *Mod.* 86. 215. 216. 403. 12 *Vin. Abr.* 119. 1 *Atk.* 47. 2 *Eq. Abr.* 406. 409. *Cowp.* 407. *Gilb. L. E.* 13. 1789.

In opposition to these arguments, it was contended, that the laws of *Virginia* ought to be proved as other facts in foreign countries; that in *Great-Britain private* statutes must be proved, either by sworn copies, or authenticated under the Great Seal; that every man is, indeed, obliged to know the laws of his own country, for they are presumed to be in every man's breast, and the statute book contains hints of them; but the laws of *Virginia* are unknown in *Pennsylvania*, and are not in any wise obligatory upon us; that the reason why *private* statutes must be proved before they can be received in evidence, applies strongly to *foreign* acts of Assembly, for no man is obliged to know them; that an act of Assembly in *print* is no better verified than if it were in *writing only*; that this act of Assembly might have been forged, or repealed, and yet, it would be impracticable on a sudden, pending a trial, to prove it; and that there is no precedent of a determination of any Court, that such a copy is good evidence; for, indeed, it militates against the general rule of evidence, "that the best evidence the nature of the case will admit, ought to be produced," and a sworn copy compared with the votes might have been had, or some other regular authentication. *Gilb. L. E.* 4. 5. 13. 16. 17. 12 *Mod.* 403. 12 *Vin. Abr.* 129. *pl.* 59. *Ibid.* 119. 120. 1 *Salk.* 121. *Cowp.* 174. *Prec. in Chan.* 207. 1 *Lill. Abr.* 207. 3 *Salk.* 154. *Doug.* 1. 572. *Bull. N. P.* 21. *Old Law of Ev.* 66. *Tri. per Pais.* 232. 3 *Journ. of Cong.* 493. *12th November*, 1777.

This subject has been very ingeniously discussed. It is in a great measure new; so far, at least, that it does not appear to have come formally before any Court, till it arose in the present cause at *Lancaster*. But, at the same time, I must remark, that I never heard till then of such evidence being refused; and without opposition, I am certain it has very frequently been admitted.

Our law is not confined to particular precedents and cases, but consists in the *reason* of them; for, the reason of the law is the life of the law. I admit, that this printed copy of an act of Assembly, though it purports to have been printed by the law printers of *Vir-*

1789. *ginia*, is not such good evidence as a sworn copy, compared with the rolls, or an exemplification under the Great Seal; but these modes of authentication are, likewise, inferior to the original law itself. If the Plaintiff in Error had been sued in *Virginia*, this printed book of the acts of Assembly would *there*, unquestionably, have been good evidence; and I can discern no satisfactory reason, why, as he is sued *here*, the same evidence should not be received, at least *prima facie*; for, although it were a forgery, and the proof in that respect could not on a sudden, during the short period of a trial, be produced; yet, in case of any reasonable suspicion, the Court might reserve the point, and give the party leave upon establishing the fact, to move for a new trial.

Lord Chief Justice *Willes* says, in the case of *Omichund* v. *Barker*, 1 *Atk.* 21. that "the rules of evidence are to be considered, as positive artificial rules, framed by men for their *convenience* in respect to the transaction of business in the Courts of Justice," but there has been no rule established, as far as my knowledge extends, concerning the evidence now under consideration. It has been a rule in the Courts of *Great Britain*, "to allow such proof as they beyond the sea will allow." This, however, must be subject to restrictions: And, although the general principle and rule of evidence is, "that the best evidence the nature of the thing will admit, shall be given," yet, by constant practice and allowance of the Judges, this rule is frequently dispensed with. Were it not, indeed, for this, controversies in Courts of Justice would be entangled with too many difficulties, and attended with too great trouble and expence, to permit men to seek for redress of many wrongs in a legal way. The same reason, that would induce this Court to require a law of *Virginia* to be proved as any other fact, must induce them to insist upon the like proof of the Laws of every other State, kingdom, or empire, however remote; a position pregnant with intolerable inconvenience; destructive to trade, commerce, and credit; and, in several cases, fatal to justice.

Though the practice of the Courts, or forms of pleadings, which pass *sub silentio*, do not *make* the law; yet, in a case like the present, a constant practice of permitting acts of Assembly, or laws to be read out of printed books, without opposition, is a great *evidence* of the law; and such printed copies, being of public notoriety, and relied on as genuine, have the presumption of authenticity, in their favour, and afford a reasonable satisfaction to the mind of their truth and accuracy.

Upon the whole, therefore, I am of opinion, that the Court below erred in the rejection of the evidence in question; and that for this cause *only*, the judgment ought to be reversed.

With respect to the errors alleged against the *second* record, they have all, except one, been considered and disallowed, in the course of the preceding observations. The one that remains to be decided is, that the Court below, on motion of the Counsel

for the Plaintiff there, permitted the declaration to be amended by the writ, after the Jury had been sworn; and then had the Jury sworn again, and received their verdict, without consent, without giving the Defendant liberty to plead anew, and without an imparlance, or awarding the payment of costs by the Plaintiff. 1789.

In support of this objection, it has been urged, that the amendment was an alteration in substance, and changed the nature of the defence; that there is no precedent of such an amendment after the Jury was sworn, therefore, it is hoped, that this Court will not enlarge the precedents of amendments, by making a new one; and that the Court below had no power to discharge the Jury after sworn, without consent; or, if they had, that they ought to have granted an imparlance. *Stiles' Pract. Reg.* 45. 49. *Salk.* 47. 3 *Lev.* 347. *Carth.* 465. 2 *Black. Rep.* 785. 2 *Stra.* 890. *Fitz.* 193. 3 *Bac. Abr.* 236. *Gilb. Pract. C. P.* 79. 80.

On the other side, it was insisted, that the amendment was only to make the declaration conformable to the writ; that the merits came before the Jury, and the cause was fairly tried; and that such an amendment may be made at any time. 3 *Blac. Com.* 406. *Conyngh. Rep.* 43. 2 *Burr.* 756. 5 *Burr.* 2834. 3 *Lev.* 347. *Sir. T. Raym.* 53. 4 *Burr.* 2569. *Cowp.* 841. 1 *Wils.* 7. 4 *Bac. Abr.* 30. *Comb.* 13. 2 *Vin. Abr.* 326.

The Court would willingly support this proceeding, if they legally could; for, they are no friends to exceptions like the present, where the merits have been fairly tried. But we can find no case, or opinion, to favour it in all its parts. I have met with but one, which mentions, that "after a Jury sworn, sometimes a Juror is withdrawn, on purpose that there may be an amendment, if it be not entered upon record." This case was not mentioned at the bar, but is reported in *Comberbach* 419. *Rex* v. *Edwards.*

Suppose, however, that the Court had given the Plaintiff leave to make the amendment before the trial, which they might unquestionably have done, as the nature of the action was not thereby changed; yet, it was in the election of the Defendant, either to take costs of the Plaintiff, or to imparl to the next term; for, he had a right to advise upon a plea fitting the declaration so amended; or, if the amendment did not, in his opinion, require an alteration of the plea, he might take the costs, and enter the same plea immediately. At all events, I think, he ought to have been allowed, if he pleased, to plead again after the amendment, and so join a new issue. 1 *Lill. Abr.* 70. *d.* 71. *a. Comb.* 58. 2 *Stra.* 950. And I have found two cases in Judge *Jenkin*'s *Centuries*, in which it is held, that a Jury discharged before verdict, shall not be charged again, but there must be a new *venire facias. Jenk. Cent.* 6. *ca.* 9. *Ibid.* 283. *ca.* 13.

Since, then, the facts relating to the amendment appear upon the record, I am of opinion, that the proceeding of the Court below was erroneous: And this judgment, also, ought, therefore, to be reversed.

1789. ATLEE, *Justice*:—In these two causes of *John Thompson*, Pltff. in Error, v. *John Musser*, I concur with THE CHIEF JUSTICE in every point except two.

One of these is the objection respecting the *Virginia* act, and the other is the mis-trial. As to the first, it seems, that the Justices below, on the trial of the cause, refused to admit in evidence, on the part of *Thompson*, a printed paper, said to be an act of Assembly of the State of *Virginia*, upon which a bill of exceptions was filed; and this is now assigned as one cause of error.

Had that act come before them exemplified under the seal of the State of *Virginia*, the Court ought certainly to have admitted it, as it would then have been within the rule of law, which requires the utmost evidence the nature of the fact is capable of; but as it was offered to them without such exemplification, or any proof of its being compared with the records of that State, or even of its being printed by the Printer of the Laws of the State, I cannot join the opinion, that the Justices below have erred in rejecting it; or, that their having refused to admit it in evidence in that situation, is a sufficient cause for the reversal of their judgment. It was offered to prove a fact respecting a certain class of *Virginia* certificates; and from the face of it, I think it will appear, that it is not the whole law of the State respecting those certificates. This might have been a reason with the Court below for rejecting it, and I should have thought it a sufficient one; for a record is not to be taken by parcels, and the whole is evidence, or none.

We are to pay a due regard to the laws of our Sister States, when we are under the necessity of determining upon contracts which have taken place within those States, and have reference to those laws: but we are to be cautious, and not to suffer ourselves to be imposed on. Exemplifications are easily obtained, and they are not expensive. We find that the Judges in *England* have generally had the precaution to require exemplifications of acts of Parliament, which did not concern the kingdom in general, properly compared and certified, before they would admit them in evidence in their Courts of Justice; though made within the kingdom, they do not deem themselves obliged by their offices to take notice of them without such exemplification. And so, I think it is a proper and necessary precaution in the Courts here, to require certified copies of the laws of our Sister States, before they are admitted with us; especially when they appear before us, as this did, in pamphlets of a few sheets, not bound up with their body of laws; and, as we are not obliged, and cannot be supposed, to know their laws, it seems the more necessary.

As to the mis-trial in one of the causes, it seems to me, that the parties themselves, at the time of the trial, waved every advantage that might have been taken of it. They permitted the amendment, and went on to trial without demanding an imparlance; the merits of the cause were fully heard; and, after the Jury left

the bar, the Counsel on both sides agreed, by writing under their hands, that the verdict should be taken by the Clerk of the Court agreeably to what should appear to be the intent of the Jury, and that they would mould it into form. After this conduct, and such proceedings, I think the objection ought not to be supported. 1789.

But, as my brethren think differently from me on these points, the judgment in both causes must be reversed.

RUSH, *Justice*:—There can be no doubt, that the laws of *Virginia* are evidence; but the question before the Court is, in what manner shall they be *authenticated*, in order to render them admissible evidence to a Jury?

Upon *established rules* of law, and, also, on general principles, I am of opinion, that the *Virginia* act, printed by the Government Printer, ought to have been given in evidence to the Jury.

No evidence shall be received, which supposes a still greater evidence behind, in the *parties own possession and power*. On this ground, the printed act ought to have been laid before the Jury; because, it cannot be said, that either the *original*, or a *copy under seal*, was in his *possession or power*. Both might have been refused to him at the office in *Virginia*; and this Court, having no control over that office, could not have given any relief. All law should be construed, as far as may be, so as to guard against what men *may do*; and not to trust to what they *will do*.

Sir *William Blackstone*, in the third volume of his Commentaries, page 336, speaking of the Court of *Chancery*, says, "If a question "comes before *that* Court, or a Court of Law, which is properly "the object of a *foreign municipal law*, they will both receive infor- "mation what is the rule of the country, and will both decide "accordingly. Both Courts follow the Law of Nations, and col- "lect it from *history*, and the most *approved authors* of all countries, "where the question is the object of that law; as in the case of the "privileges of ambassadors, hostages, or ransom bills. In mercan- "tile transactions, they follow the marine law, and argue from the "usages and authorities received in all countries." From this language, it would seem to be the opinion of the author, that the same evidence, which any Court abroad would have received, would also be received in *England*, where the subject in litigation requires it.

If, then, the *Virginia* law might have been given in evidence in that country, of which there can be no doubt; it was the duty of the Court in *Pennsylvania* to have received information of the rule, or law, of *Virginia*, from the same source that would have been satisfactory to the judges there. Every country has a right to promulgate its laws as it pleases; and whatever *printed authorities* are received in a foreign country as evidence of its laws, are, in my opinion, evidence of the same laws to a Court and Jury in *Pennsylvania*.

1789. To the *larger* record, as it was called at the bar, to distinguish it from the other, a second objection has been made, *to wit*, that the declaration does not say, that the Defendant neglected to pay or deliver 100,000 weight of tobacco; the declaration being on a penal bill. With regard to this point, I rather think that the verdict will not cure the objection. The case in *Cro. Car.* 515. *Baynes* v. *Brighton* seems to be in point. Debt was brought for forty shillings; and the declaration was held ill after verdict, because the Plaintiff had not alleged, that the twenty shillings, were not paid at the day: for, otherwise, the forty shillings were not due. I am induced to lay the more stress on this authority, because the principle of that case is recognized both in *Douglas* and *Salkeld*'s reports. In *Dougl.* 657. by a recent and solemn decision of the whole Court, it has been held, that if the indorsee does *not prove at the trial* a demand on the acceptor and refusal, even a verdict, in such case, will not help him. The well known case of omitting the *scienter* is there admitted to be law. The case is expressly referred to as reported in *Salk.* 662. The declaration was, that the Defendant kept a bull that used to run at men but did not say *scienter*, &c. This was held ill after verdict; for the action does not lie, unless the master knows of this quality; and the Court cannot *intend it was proved at the trial*, as the Plaintiff need not prove more then was in his declaration. So in the case at bar: the Court cannot intend that the Plaintiff proved at the trial, that the Defendant did not pay, or deliver, 100,000 weight of tobacco; because, not being alleged in the declaration, the Plaintiff was not under any necessity of proving it.

With respect to the other objections to the larger record, I entirely concur with my brethren.

I concur, also, that there has been a mis-trial in the other cause tried between the same parties. *Black. Rep.* 785. is in point. Where the declaration is amended in a material point, a rule should be given to plead. If the Plaintiff has a *right* to amend, he is also *bound* at the same time to give a rule to plead, that the Defendant may not be surprised at the trial; and omitting to do so, is error.

The Jury was sworn to try the precise and identical issue joined by the pleadings; and if *that* was afterwards altered or changed by the Plaintiff, the verdict will not help it; because a verdict will not help that which was *not in issue*. *Gilb. Hist. and Pract. Com. Pleas*, *p.* 100.

The Court below had no power to discharge the Jury after they were sworn, without the consent of both parties. It is true, that in 2 *Stra.* 1117. it appears that a Jury was dismissed after they were sworn, because *no issue* was joined. But as there was an issue joined in the cause of *Musser* and *Thompson*, the Court below have acted erroneously, and contrary to law, in discharging the Jury without the consent of both parties.

I think, upon the whole, that judgment should be reversed in both causes.

BRYAN, *Justice*:—As I agree entirely in the opinions given by the *Chief Justice*, for the reasons which he has assigned, I shall content myself with generally declaring, that I think the judgments on these records ought both to be reversed. 1789.

BY THE COURT:—Let the judgments of the Court below, on both records, be set aside.

RESPUBLICA *v.* Negro BETSEY, *et al.*

THIS was a *Habeas Corpus ad subjiciendum*, which had been allowed by Mr. *Justice* BRYAN, and, afterwards, brought by him before the Court. The case was twice argued; first on the 29th of *June*, 1786, by *Bradford*, on behalf of *Samuel Moore*, who claimed the negroes as his servants, and by *Lewis*, in behalf of the negroes; and a second time, in *April* term, 1789, by the same Counsel for the Claimant, and by *Ingersoll* and *Fisher* for the Defendants. The Court having held the matter under advisement till the present term, the Judges delivered their opinions separately, in the following order; the Chief Justice stating the circumstances of the case, and the arguments of the Counsel, in the course of his observations.

M'KEAN, *Chief Justice*:—The negro *Betsey*, for whom the *Habeas Corpus* issued (and upon whose fate, that of the two other negroes depends) was born before the 1st of *March*, 1780, *to wit*, in the year 1779, and her name, age, sex, &c. were not registered in the office of the Clerk of the Peace of the county of *Chester*, in which the master, *Samuel Moore*, then inhabited, on, or before, the 1st of *November*, 1780, agreeably to the directions of the act of Assembly, entitled, "An act for the gradual abolition of Slavery," passed on the 1st of *March*, 1780. See 2 *State Laws*, 282.

The question, that is submitted to our consideration upon these facts, is, whether the negro can be held as a servant until she attains the age of twenty-eight years? or, whether she is *absolutely* free?

On the part of the master, it has been argued, that, although by the fifth and tenth sections of the act of Assembly, the owner, or master, of any negro, or mulatto, slave, or servant for life, or for thirty-one years, then within the State, or his lawful attorney, ought to cause such negro, or mulatto, to be registered on, or before, the 1st day of *November*, 1780; yet, by the fourth section, it is provided, that every negro, or mulatto child, born within this State, after the passing of the act, who, in case the act had not passed, would have been born a servant for thirty-one years, for life, or a slave, should be deemed a servant until the age of twenty-eight years. It was urged also, that the Legislature could not intend a greater favour to negroes and mulattoes, born as slaves, or servants for life, or until the age of thirty-one years, *before* the passing of that act, than to those born *after*: that the *intention* of the Legislature is to govern in the construction of this act, which, as

1789. well as in all other legislative acts, in doubtful cases, must be construed according to the reason and sense of the law-makers, *expressed* in the several parts of the act, or to be *collected* by considering the frame and design of the whole. 11 *Mod.* 161. And that the maxim is, *Ubi eadem ratio, ibi idem jus.*

For the negro *Betsey*, the Counsel have agreed in the rule for the construction of acts of Assembly, but, they argue that the 5th section of the act under consideration is *positive*, that all negroes and mulattoes, held as slaves, or servants for life, or until the age of thirty-one years, should be registered before the 1st of *November*, 1780, or that they should be free; that this was the intention of the Legislature is confirmed by the 10th section, which declares that they shall be deemed free-men and free-women; that where the words are *express* and *positive*, there is no room left for construction; that the law favours *liberty* more than *property*; and that if the case should appear doubtful, the judgment should be in favour of the *liberty* of negro *Betsey*.

Since the argument, the Court have again read the act of Assembly, and maturely considered that, and the several reasons urged by the learned Counsel on both sides; and as this is the first case that has come before them upon the arguments of Counsel, and as the judgment now to be given, will govern in all cases of the like sort for the future, it seems to be proper to give the grounds and reasons upon which they found their decision.

It may be observed, that neither in the *fifth* nor *tenth* sections, is it said, that negroes or mulattoes, held as slaves, or for life, or until thirty-one years of age, not registered on or before the 1st of *November*, 1780, shall be *free*, and discharged from any *longer service*, but only (by the 5th sect.) that they shall not be deemed to be *slaves*, or *servants for life*, or until the age of *thirty-one years*; and by the *tenth* section it is added, that they shall be deemed as *free-men and free-women*. The words "*free-men and free-women*," seem to have been used in opposition to the word "*slaves*," or "*servants for life*," or, "*until the age of thirty-one years*," and not to mean, that they shall be absolutely free from every species of servitude. Had this been the intention of the Legislature, words were easily to be found to express it in the most unequivocal manner.

There is a section in this act of Assembly, which was not adverted to by the Counsel on the first hearing, that contributes to clear up the intention of the Legislature on this point: It is the *sixth*, and comes in by way of proviso or restraint upon the *fifth*. There, the owners or masters of any such negroes or mulattoes, "*though not registered*," shall be answerable for their maintenance in case they become paupers, unless such owners or masters shall manumit them before they arrive at the age of twenty-eight years; by which it is evidently implied, that the former owners or masters may still have an *interest* in them, notwithstanding they should not be registered; otherwise, why should it be made a condition of an

exemption from maintenance, that they should execute and record in the proper county a deed or instrument, securing to such slaves, or servants, their freedom before twenty-eight years of age? 1789.

The *interest* remaining to the owner, or master, in an unregistered negro or mulatto, is not expressly declared in any part of the act; but from the scope of the whole it may be collected, that the meaning and intention of the Legislature was, that all negro or mulatto slaves, or servants for life, or until they should arrive to thirty-one years of age, within the State at the time of passing the act, who were then under the age of twenty-eight years, might be detained as servants, until they arrived to that age, though they should not be registered; but if the master detained them in service until that age, and they should afterwards become chargeable, in such case, he, his executors, administrators, or assigns, should be obliged to maintain them. This construction seems to be further warranted from that part of the fifth section, which assigns the reason for registering the names, *ages*, and sexes, of slaves, and servants for life, and until thirty-one years of age, to wit, in order to ascertain and distinguish *them* from all other persons; those born before, or after, passing the act, and under twenty-eight years of age, as well as those who should not be registered, though above twenty-eight years of age.

Though the act of Assembly, with respect to this question, is not so clear as it might have been, and as I could wish it, and though different gentlemen may reasonably entertain different sentiments concerning it, yet, as I must give an opinion, it must be my own. Upon the whole then, I think, that negro *Betsey* should remain as a servant until she shall arrive to the age of twenty-eight years, unless freed sooner by her master; and that she be then entitled to the like freedom dues and other privileges, as if she had been born after passing the act for the gradual abolition of slavery.

I know not what other construction to put on the sixth section. If the word "*not*" in the fifth line from the end of this section, had been expunged, I should have been of a different opinion; but the engrossed act has been examined, and the word "*not*," is in it. The Legislature must have had some meaning in using this word, as well as in the sentence that provides, that, "unless his or her *master or* "*owner*, shall, before such slave or servant attain his or her twenty-"eighth year, execute and record in the proper county, a deed or "instrument, *securing* to such slave or servant his or her *freedom.*"

By this judgment, if I should be mistaken, the negro *Betsey* is in no worse situation, than if she had been born after the passing the act, and I do not know a reason why she should be in a better. Were she discharged from her master, she would be incapable to take care of herself, and her parents are unable to educate her: She cannot suffer so much by living with a good master, as being with poor and ignorant parents. By a contrary judgment, she, as I have just hinted, would be little benefited, and her master, who

1789. hitherto has derived no advantage from her services, and has been subjected to considerable expences for her food, clothing, and lodging, would be a great sufferer; so that the balance on this consideration seems, likewise, to preponderate on the side for which I have declared my opinion.

ATLEE, *Justice*:—This cause was argued in the *Supreme* Court in *June*, 1786; but as Mr. *Justice* RUSH and myself were then absent, another argument was requested for our satisfaction, and the gentlemen of Counsel for the parties having obligingly acquiesced in our wish.

The question arises upon an act of Assembly of this State, entitled, "An act for the gradual abolition of Slavery," passed on the 1st day of *March*, in the year 1780; and it is, whether a negro child born *before* the passing of that act, and not registered agreeably to the directions it contains, shall be free, or be in a similar situation with those born *after* the passing of the act, that is a servant until twenty-eight years of age?

It is agreed that these negro children were born before the passing of the act, and that they and their parents were, at that time, the slaves, or servants for life, of *Samuel Moore* of *Chester* county, who neglected to register them agreeably to the directions of the act. In consequence of this neglect on his part, the parents have obtained their freedom, and the children now seek it, that they may follow, and be under the care and direction of those parents, instead of a master.

The act, after declaring in the third section, that negroes and mulattoes, born after it was passed, shall not be deemed slaves, or servants for life, and extinguishing all slavery of children in consequence of the slavery of their mother, provides in the fourth section, that such children as should be born *after* the passing of the law (who would, in case it had not been made, have been born servants for years, or life, or slaves) shall serve until they attain the age of twenty-eight years, and, in case of such children being abandoned by the master or mistress, directs their being placed out apprentices by the overseers of the poor.

So far the act confines itself to children *born after* it was passed. The following section, to wit, the fifth, includes every description of these people of both sexes and all ages, and under this and the tenth section it is, that the parents of these children have obtained their freedom. This directs that every owner of negro and mulatto slaves, or servants for life, or till the age of thirty-one years, at that time within the State, shall cause the names, ages, and sexes, of such their slaves and servants to be registered, or entered on record, in books to be provided for that purpose by the Clerks of the sessions in the several counties of the State, on or before the first day of *November*, 1780; and declares, that no negro or mulatto then within the State, shall, from and after the said first day of *November*, be deemed a slave, or servant for life, or till the age of thirty-

one years, unless his or her name shall be entered as aforesaid on such record. And by the tenth it is enacted and declared, that no man or woman of any nation or colour, except the negroes and mulattoes, who shall be registered as aforesaid, shall be deemed, adjudged, or holden, within the territories of this Commonwealth, as slaves, or servants for life; but as free-men and free-women. 1789.

Under these sections of the act, it should seem, that freedom is secured to every negro or mulatto within the State, at the time of making the act, who was not registered agreeably to its directions, on the first day *November* 1780: but a doubt hath arisen under the sixth section, with respect to those, who are under the age of twenty-eight years, though born *before* the making of the act.

This section comes in by way of proviso to the fifth, and declares, That any persons who had the ownership or right to the service of any negro, or mulatto, at the time of passing the act, his, or her heirs, executors, administrators, and assigns, shall be liable to the overseers of the poor of the city or place to which such negro or mulatto shall become chargeable, for the expences such overseer may be put to, through the neglect of the owner, master, or mistress of such negro or mulatto, notwithstanding the name and other descriptions of such negro or mulatto *shall not* be entered and recorded as aforesaid; unless the master or owner shall, before such slave or servant attain his or her twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant, his or her freedom.

This clause has given rise to the argument, and it is contended, on behalf of *Samuel Moore*, that he has a right, upon a just and reasonable construction of it, to the service of these children, until they arrive to their respective ages of twenty-eight years, notwithstanding they were born before the passing of the act, and were not registered: But I cannot hold with that opinion.

The fifth section of the act requires entries of all the negro and mulatto slaves, or servants for life, or till the age of thirty-one years, within the State at the time of making the act; it directs the mode of those entries; it fixes the time within which the entries shall be made; and, without any exception in respect to their ages, declares that no negro or mulatto then within the State, should be deemed a slave or servant for life, or for thirty-one years, unless his or her name should be registered within the time limited. The master or owner had his election whether to enter them, or not; if he did, he secured to himself the right he had in them before the making of the law; and, if he did not, it appears to have been the intention of the Legislature that he should forfeit all right to their services. The tenth section, I think, shows this expressly; for, it not only enacts that such unregistered persons shall not be deemed as slaves, or servants for life, as in the other sections, but adds, that they shall not be holden or adjudged so; and further, that they

1789. shall be deemed, adjudged, and holden, as free-men and free-women, in opposition to every species of servitude before taken notice of in the act. As this ambiguous section seems annexed indeed as a proviso to the fifth, it may be taken as intended to deter persons from holding in their service negroes and mulattoes, whom they had not registered according to law.

Had the Legislature intended, that all those who were born before the making of the act, and had not attained the age of twenty-eight years, should serve till they arrive to that age, they would have shewn that intention in express terms. As persons of that description among the negroes and mulattoes, made a great part of their number, they would have made provision for those of tender age, who might happen to be abandoned by their owners, as they have done with respect to those born after the act, and abandoned; they would have made like provision for their redress in case of severe treatment, and, in proportion to their term of servitude before they attained the age of twenty-eight years, they would have directed freedom dues, as they have done for the others.

With respect to persons of this colour, those who were servants among us before the passing of the act, were either slaves, or servants for thirty-one years: the servitude of twenty-eight years is created by this act, and appears to me to be limited to those who are born of registered slaves after it was passed, and to those only.

The preamble to the act, among the unhappy circumstances formerly attending these people, mentions their being cast into the deepest affliction by an unnatural separation and sale of husband and wife, from each other, and from their children: In the present case, it is attempted to separate these children from their parents, by a construction which appears to me to clash with the intention of the makers of the law; while such a construction as will secure freedom to them, and restore them to their parents, will I think, agree best with the design of the Legislature.

I am, therefore, of opinion, that the implied construction contended for in behalf of *Samuel Moore*, on a doubtful and dark clause in the act, cannot be admitted to operate in his favour, against the express letter and direction of its fifth and tenth sections; and, consequently, that these persons ought to be discharged from his service.

RUSH, *Justice*:—The question on the *Habeas Corpus*, in the case of *Samuel Moore*'s negroes, is a question of construction, arising on the act for the gradual abolition of slavery.

It is admitted, that those negroes were born before the first of *March* 1780, the date of the law; and that *Samuel Moore*, who now claims them, was *then* in possession of them, and that he neglected to register them. It is also admitted, that they were slaves for life, when the act passed.

On the one hand, it is contended, that his neglecting to register them, is attended with an entire loss of their service for life; and on the other, that it divests the right only from and after the age of twenty-eight years. 1789.

Whatever be the intention of the Legislature, *that* must govern. But the difficulty is to find out the intention. An act of Assembly, being the declared will of the Legislature, is to be construed altogether; like the last will and testament of an individual.

When the act for the gradual abolition of slavery passed, there were in *Pennsylvania* two species of slavery derived from birth; the one being a slavery for life, the other for thirty-one years. The latter took place where a child was born of a white mother by a black father. The usage in such case has been, to hold the issue in slavery till the age of thirty-one years, in consequence of its base birth. This shews the reason why the Legislature have used the terms "slave, or servant for life, or thirty-one years," in the fifth section of the act: The words are, "No negro or mulatto within this State shall, after the first of *November*, be deemed a slave, or servant for life, or till the age or thirty-one years, unless entered upon record;" to prevent and abolish slavery arising from birth, being the great object of the law, as may be seen in the third section of the act now under consideration. It shews further, that those expressions were not adopted by the Legislature, with a design to admit slavery till the age of twenty-eight, in the case of children born *before* the act.

By the particular wording of the tenth section, it would seem, at first view, as if the right to service in the case of a registered slave, who was such by his birth, till the age of thirty-one years, was either wholly taken away; or, that registering him, would make him a slave for life. The words are different from the fifth section, and are remarkable. The clause runs, "No man, or woman, of any nation, or colour, except negroes, or mulattoes, registered, shall be a slave, or servant for life, but free." Here the words, "or till the age of thirty-one years," are omitted. Now, if no negro, or mulatto man or woman, unless registered, can be a slave for life, it seems to be a natural consequence, that if registered, they will become slaves for life. But this construction is most certainly erroneous; because it proves too much, as it would include slaves for thirty-one years. Again if registering does not make him a servant for life, which it cannot do, so neither does *this* clause give the master a right, in consequence of registering such negro, to detain him till the age of thirty-one years. In the genuine and liberal construction, therefore, of the tenth section, the words, "or till the age of thirty-one years," should be supplied; and then it will speak the same language with the fifth section, and convey the same idea.

The true intent and meaning, then, of those two sections, considered in one view, I take to be, that all negroes and mulattoes

1789. born at the time of passing the act, shall be free from every degree of servitude, unless registered by those who had a right to their service for life, or thirty-one years, or by their attornies.

This construction of the law, is corroborated by adverting to the fourth section of the act. By this section, in case any *after born* child should be abandoned by its master or mistress, from an idea that its service till the age of twenty-eight, was not a sufficient compensation for bringing it up, or from any other cause, the overseers are directed to take charge of it:—But why provide for a child born *after* the act, in case it should be abandoned, and not for a child born *before* the act in a similar situation? Surely an abandonment was as likely to happen in the one case, as in the other, and from the same cause. The silence of the Legislature on this point, affords a striking argument to prove, that they never entertained an idea that children born *before* the act, were to be servants till the age of twenty-eight; ortherwise, the same provision would have been made in both cases. The master, in the case before the Court, had it in his power to have acquired a right to the children for life, if he had chosen to register them; or by neglecting it, to give them up for ever: And this observation appears to me a satisfactory answer to the argument, that children born *before* the act, ought not to be placed in a better situation than those born *after* it. The master might have put them in a much worse situation; and, having run that chance, they ought not now to be placed on the same footing with those born *after* the act.

But the greatest difficulty in the cause still remains; that is, the sixth section of the act.

By this clause, "Every owner of a negro or mulatto, at the time of passing the act, his heirs, executors, administrators, and *assigns*, shall be liable to the overseers of the poor, where such negro or mulatto shall become chargeable, for such necessary expences as the overseers may be put to, through the neglect of the owner or master of such negro or mulatto; notwithstanding the name and other descriptions of such negro or mulatto shall *not* be entered and recorded as aforesaid; unless his master or owner shall, before such slave or servant attain his twenty-eighth year, execute and record in the proper county, a deed or instrument securing to such slave or servant his freedom."

The first observation to be made on this section is, that the neglect of the owner or master therein mentioned, does not mean his neglect to register, but his neglecting to provide for the negro, whereby the overseers are obliged to do it.

I have on several former occasions considered this clause with a good deal of attention. I once suspected there was a mistake in it, and that the word *not* should be expunged in the paragraph which says, "notwithstanding the name and other descriptions of such negro or mulatto, shall *not* be entered and recorded as aforesaid."

Accordingly, I examined at the Roll's office, the law signed by the Speaker, and also the recorded act, but found them both correspond with the printed law. I still think, however, in construing the act, *that* word should be rejected. The clause then will mean this,—that, notwithstanding such act of registering, whereby a right is vested in the master, yet in case the negro should become unable to support himself, and the overseers should do it, the master should be liable to them. In other words, although you comply with the law, and register your negro, which will make him your property; yet, that circumstance shall not exempt you from the burthen of supporting him afterwards; *unless* you set him free by deed, recorded in the proper county, before he attains the age of twenty-eight years. 1789.

If it should be observed, that this would make the Legislature say a very idle thing, to wit, that a man shall be bound to support his own slave; I answer, the clause goes further: It prohibits him from abandoning his right, unless he does it *before* his arrival at the age of twenty-eight; and where at the time of registering him he was *above* that age, he can never afterwards abandon his right, but shall remain always liable to support him. Twenty-eight years was esteemed a proper age, in case of emancipation, under which, it might be reasonably supposed, that a negro, by a course of industry for a number of years, might add so much to the public stock of wealth, as to be entitled to receive support from the public, if he should be unable to help himself.

By the old law, a person might set free his negro at *any age*, on giving security at the County Court, that he should not become chargeable to the public, but that law being repealed by the act now under consideration, it became necessary to restrain the exercise of that right, and to put it on some equitable footing: which this clause has done; by ordering that the owner of a negro, although registered, shall *always* be liable for any necessary expences the public may be put to, through his neglecting to provide for him, unless he shall set him free before the age of twenty-eight, in the manner prescribed by the act.

This construction of the sixth section is still further confirmed by attending to the word *assigns*; every owner of a negro, his executors, administrators and *assigns*, shall be liable although the negro be not entered and recorded. But there can be no assignee of an unregistered negro, because he is free. The clause, therefore, plainly supposes a transferable property in such negro to exist, which can only be by registering.

To this construction it may be objected, that there will be no precision in the act, in case of a wilful neglect to register old negroes, with a view to throw them on the public; for, by not registering them, they became free. It would be a sufficient answer to

1789. say, that if due provision be not made in every possible contingency, the evil must remain until the Legislature think fit to remove it by a new law on the subject. But, we may observe, that, in fact, there could have been few negroes so old as to be absolutely useless; and still fewer masters so forgetful of past services, and insensible to the feelings of humanity, as to neglect registering their old negroes, in order to turn them out of doors, and render them a burthen to the public. As nothing of this kind has ever yet been heard of, we may safely pronounce, that the Legislature has acted wisely in supposing that any provision in such case, would have been entirely superfluous.

Upon the whole, if we read the act without the word *not*, the law in all its parts will appear a consistent and rational system. In any other view of it, nothing can be more obscure, perplexed, and unintelligible. The word in all probability has slipt into the act by inadvertence; some member mistaking the design of the clause, and moving *that* as an amendment, which has proved the source of so much intricacy and litigation.

Instances are not wanting where, in construing wills, Courts have rejected or supplied words, to comply with the intention of the testator. It is not necessary to cite the authorities to this purpose, as they are familiar to every one.

In the construction of statutes too, Judges have sometimes gone contrary to the general words of it. They have expounded the words of an act *contrary* to the text, to make it agree with reason and equity. 19 *Viner*. 514. There can be no exposition against the *direct letter* of an explanatory statute, which admits there may be against an original statute. Where the terms and letter of a statute are obscure and difficult, we must resort to the intent. 19 *Viner*. 517. 520. Though the statute of 1 *Eliz*. makes *void* all leases by Bishops, *to all intents and purposes*, yet the lease is good against the lessor. To which cases I will only add a determination lately given in this Court, in the case of *Levinz* v. *Will*, (*Ant*. 430.) Although the words of our act of Assembly declare, "that no mortgage deed shall be good or sufficient to pass any freehold or inheritance, or any estate for life, or years, unless recorded within six months from the date;" yet this Court very properly held such mortgage good against the mortgagor; a decision which is certainly repugnant to the express words and letter of the act.

I concur, therefore, with my brother, Judge ATLLE, that the negro children *Betsey*, *Cato*, and *Isaac*, mentioned in the return to the *Habeas Corpus* as detained by *Samuel Moore*, should be discharged; it appearing to me, he holds them in custody against the law of the land.

BRYAN, *Justice*: In this case, I confess, that hitherto I have agreed in opinion with THE CHIEF JUSTICE; but I now unite with

my brothers ATLEE and RUSH, upon this principle, that it was in the power of *Samuel Moore* to have secured the service of the negroes in question; and, having omitted to do so, he cannot, on the one hand, take advantage of his own negligence; nor, on the other, will an ignorance of the law excuse him. The tenth section of the act of Assembly seems, indeed, inaccurate and insensible; but, as upon a clause of so obscure a kind, I would not wish to press an argument against liberty, I must declare my voice to be in favour of the discharge of the negroes. 1789.

BY THE COURT:—Let the negroes be discharged.

Common Pleas.

PHILADELPHIA COUNTY.

December Term, 1789.

LYLE, Adm'or. *v.* FOREMAN.

THIS was a *Foreign Attachment*, which issued returnable to the present term; and, on arguing a rule to shew cause, why the writ should not be quashed, it was proved, that, on the 5th of *December*, the Defendant was at *Lancaster*, in his way to *Fort Pitt*, where he intended to proceed to the *Spanish* settlement below the *Natches*, on the *Mississippi*, but was actually at *Fort Pitt* on the 2d of *January*, 1790.

SHIPPEN, *President*, observed, that while a man remained in the State, though avowing an intention to withdraw from it, he must be considered as an *inhabitant*, and, therefore, not an object of the *Foreign Attachment*. If an inhabitant clandestinely withdraws, or secretes himself, to avoid his creditors, he becomes liable to the *Domestic Attachment*. The having once been an inhabitant will not, however, protect a man for ever from a *Foreign Attachment*, where he has notoriously emigrated from the State, and settled elsewhere. But the case before the Court, is that of a *Foreign Attachment* issued at the very time that the Defendant was an inhabitant of the State, which cannot be maintained.

Let the rule be made absolute.

Willcocks and *Sergeant*, for the Plaintiff; *Ingersoll*, for the Defendant.

1789.

GRAFF v. SMITH's Adm'ors.

THIS case came before the Court on a rule to shew cause, why the Sheriff should not be directed to postpone the sale of lands taken in execution in the hands of the purchasers from *John Smith*, the eldest son of *Robert Smith*, the intestate, till all the lands remaining unsold in the hands of the other children of *Robert Smith*, should be sold by virtue of the execution.

After argument, THE PRESIDENT stated the circumstances of the case, and delivered the opinion of the Court, in the following manner.

SHIPPEN, *President*:—The facts agreed on both sides in this cause, are, that *Robert Smith* died intestate indebted to several persons, and possessed of a considerable real estate, but not of sufficient personal estate to pay his debts; that his administrators applied to the *Orphans' Court* for an order to sell certain parts of the real estate, sufficient to pay the debts and maintain the children; that such order was accordingly obtained, and that part of the real estate was sold for that purpose; that a subsequent application was made to the *Orphans' Court* for a division of the remainder among the children; that the part allotted to *John Smith*, the eldest son, on that division, was by him sold and conveyed to *bona fide* purchasers; and that *John Smith* was himself an administrator, and neglected to discharge all the debts out of the sum arising from the sale of the lands ordered to be sold by the *Orphans' Court*, but wasted the money, and is supposed insolvent.

Some of the creditors of *Robert Smith*, whose debts remained unpaid, have since obtained judgments, and issued executions against the lands of the intestate, as well those sold by *John Smith*, under the order of division, as against the lands remaining unsold in the hands of the younger children.

Three questions have arisen upon the argument.

1. Whether, upon the death of the intestate, his lands were bound to the payment of the debts, in such a manner, as that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same to *bona fide* purchasers?

2. Whether the purchasers from one of the heirs, is bound to contribute to the other heirs?

3. Whether the purchasers under the order of the *Orphans' Court*, are likewise bound to contribute?

1. In order to solve the first question, it will be necessary to take into view the several acts of Assembly which subject lands to the payment of debts.

The act of 1700 subjects all lands of debtors to sale on judgment and execution against them, their heirs, executors, or administrators.

1789. The act of 1705 repeats the same provision, with the restriction, that, if the clear yearly profits will pay the debt in seven years, the land shall be delivered to the Plaintiff upon a reasonable extent.

Under these acts the real estates of debtors have been held liable to sale by execution, whether they be living, or dead; if living, under a judgment and execution against themselves; if dead, under a judgment and execution against their heirs, executors, or administrators.

By the Intestate Act, passed likewise in 1705, there is a particular provision in case of intestacy, that the Administrator may sell such parts of the real estate as the *Orphans' Court* should allow of, as sufficient to pay the debts, maintain the children, and improve the residue of the estate. By this act the surplusage, or remaining part of the intestate's lands, not sold, or ordered to be sold, by virtue of that act, is directed to be divided among the intestate's widow and children, in the proportions therein expressed.

Although the *surplusage* only is here directed to be divided, yet the construction has always been, that where there are no debts, or where they have been otherwise satisfied, the division shall notwithstanding take place, the act being considered as a general law of descents and distribution.

It is contended, on one side, that the word *surplusage* in the latter act implies strongly that the remaining part only of the real estate, *after payment of debts*, is vested in the heirs, and that they shall take nothing till the debts are paid; or, if they do take them, it must be *cum onere*.

On the other side, it is said, that the act was made for a particular purpose, that the word *surplusage* relates only to the remainder of the lands *not ordered to be sold by the Orphans' Court*, and that there are no words which express or imply the surplusage to mean *after payment of debts*.

Upon the former construction, however, it is urged, that, immediately on the death of the intestate, there is a *Lien* created on all the real estate in favour of the creditors.

Without entering into the doctrine of *Liens* under the words of this act, which would only affect the estates of persons dying *intestate*, I would choose to consider the question on broader ground; that is, how far, and in what manner, the real estate of deceased persons, whether they die *testate* or *intestate*, is bound by our laws to the payment of their debts.

That such real estates are a fund for the payment of debts, is not controverted; but, it is contended, that they are no otherwise a fund after the death of the debtor, than in his lifetime; and that as he himself could have aliened before judgment, so his representatives could likewise alien, and that the lands are not specifically bound, till judgment against the executors or administrators;—that

if, indeed, they are then unsold, they remain a fund, but if aliened, no remedy remains except a personal one against the seller. 1789.

The real and personal estates are both funds for the payment of debts. The personal estate, there is no doubt, is immediately bound on the death of the debtor; it goes into the hands of the executor, or administrator, and is assets in his hands for the payment of debts; specific personal property, being in its nature perishable, may be sold for that purpose, and the executor, or administrator, is personally bound to answer for the value. In the case of the administrator, he must give security before the administration is committed to him: In the case of an executor, being entrusted by the testator, he gives no security in the first instance; but, in case of probable insolvency, he may be compelled, likewise, to give security. In both cases, the whole personal estate, or its value, is bound, from the moment of the debtor's death, to the payment of his debts. The real estate is, likewise, confessedly a fund for the payment of debts. It is a fund, however, that does not actually go into the hands of the executor, or administrator, as assets in the ordinary course; but it is a fund, made such by positive law, in another form; that is, creditors may issue executions, and sell it for the payment of their debts, on a judgment against the executor, or administrator; for, it is not necessary, nor has it been usual, to bring the action against the heir. The lands, however, go into the hands of the heir or devisee, who gives no security, and between whom and the creditors there is no privity: They are made a fund for the payment of all debts, and must necessarily have been intended by the Legislature to be a certain, and not a precarious fund; for, since it is declared, that the creditors may take them in execution on a judgment against the executor, or administrator, it must be meant that they should have the fruit of that execution; and as there is the same reason under the law, that they should be equally liable with the personal estate from the death of the debtor, they must necessarily be liable in such a manner as to be answerable at all events, which can no otherwise be, than by considering them as specifically liable in whosoever hands they may be. If it were otherwise, they would prove no fund at all; for the devisee, or heir, knowing that if judgments were obtained, he should lose his land, would, in every instance, where he apprehended debts beyond the amount of the personal estate, immediately sell them, and thereby entirely defeat the intent of the Legislature, in making them a fund for the payment of debts.

The mischief of this doctrine is still more striking, if we consider, that the estates of the inhabitants of *Pennsylvania*, out of the city of *Philadelphia*, are chiefly real estates, and if they were immediately alienable by the heirs, without being afterwards liable for the ancestors debts, few creditors to any amount would ever recover their debts, although, perhaps, the debts may really have been contracted on the credit of the lands.

1789. Another consequence might likewise follow, that where the father dies indebted leaving sufficient real estate, and but little personal, if the heir, or devisee, being likewise indebted on his own account, takes the land in the manner contended for, then *his* creditors by obtaining judgment against him, before his father's can obtain judgment against the executors, will recover their debts out of his father's lands, whose creditors would in that case be entirely cut out. This would certainly be too unjust, and repugnant to the spirit of our laws, ever to receive the sanction of a court of justice.

On these grounds, it is, as I take it, that lands, of deceased persons, have always heretofore been considered as liable to be taken in execution for debt, in the hands of a purchaser from the heir, or devisee. It is a construction of the law that has so long prevailed, that it would be now very dangerous to unsettle it, as many titles to land may depend upon it.

Although there may not have been any express determination of this point, yet a point has been determined which is within the reason of the case. A widow's right of dower commences with her marriage; it is held so sacred a right that no judgment, recognizance, mortgage, or any incumbrance whatever, made by the husband after the marriage, can at common law affect her right of dower: even the king's debt cannot affect her. Yet it has been held under our acts of Assembly, for making lands chattels for the payment of debts, that as to lands taken in execution after the death of the debtor, the widow is barred of her dower. If the widow whose right initiated with the marriage, shall lose her dower in favour of creditors, by much stronger reason the heir, whose right did not commence till the death of the debtor, should be barred from taking the land discharged of the debts.

II. The second question in this case is, whether, after a *bona fide* sale by one of the heirs, the purchaser is bound to contribute in aid of the other heirs, whose land remains unsold?

Where there is equal equity in two contending parties, it is always an unpleasant task to decide between them; and, in that case, there can be no satisfactory rule but the *strictum jus*. If there should, however, be any *laches* on one side, and none on the other, this, even on equitable principles, will have considerable weight in the decision.

The rules of contribution, as they appear in *Herbert's case* in 3 *Co.* 13, are these—If a man is seized of three acres of land and enters into a recognizance, or statute, and enfeoffs *A* of one acre, and *B* of another, and the third descends to the heir; in this case, if execution is sued only against the heir, he shall not have contribution; for, coming to the land without consideration, he sits in the place of his ancestor, and shall not have contribution against any purchaser: But, if execution be sued against one of the purchasers, he shall have contribution against the other purchaser and the heir. So,

if judgment be obtained against a man that dies leaving two daughters, who make partition, in this case, if one only is charged, she shall have contribution; for, as one purchaser shall have contribution against another, so one heir shall have contribution against another heir, for they are *in equali jure*. The *dictum*, that the heir shall not have contribution against *any purchaser*, clearly means *any purchaser from the ancestor*, and cannot consistently with the case stated in *Coke* mean any other. If then, one parcener shall have contribution against another parcener, it is most clear, that one co-heir under our laws of descent, shall have contribution against another co-heir. But a distinction is made between a co-heir and a purchaser under him. Every purchaser, except in some special cases, stands in the shoe of the person he purchased from, and cannot have a better title than he had; and, as to contribution, he holding under one of the co-heirs, must be considered as in *equali jure* with the other co-heirs. 1789.

One of the special cases, where a purchaser stands in a more favourable light than the person purchased from, is where there is a secret trust, and the purchase is made without notice, and there the purchaser shall hold the land discharged of the trust. But there appears no similarity between that case and this, where the law of the land, having made real estates chattels for the payment of the debts of the ancestor, every purchaser from the heir must be presumed cognizant of it, and is bound to take care, if he will make the purchase, to be secured against such debts. If he neglects this, he seems to confide in the seller that he hath both the will and ability to do it.

The hardship upon purchasers may, in particular instances, be great, but it may generally be prevented by a proper caution. Where there has been a suspicion of out-standing debts, it has been very usual to make the purchase under an execution. At any rate, the fundamental security which the law has given to creditors should not be destroyed, or the title of co-heirs affected, by the omissions, or temerity, of purchasers.

It is here suggested, that there may be probably sufficient in the hands of the younger children to pay the debts, without calling on the purchasers. But, is it reasonable, is it just, or can it be legal, that the younger children should be stript of all their fortunes, and that the share allotted to the eldest son, who had no better right of exemption than they, should not bear part of the burthen? especially, as those younger children had no participation in the sale, or wasting the money; nor was it by any precaution whatever in their power to prevent either; whereas it was in the power of the purchasers to be indemnified, if they had thought proper. Such a doctrine would enable the elder son, in most cases, to lay the whole burthen upon the younger children, who are frequently helpless; and, during their minority at least, prevented from standing an equal chance with him.

1789. III. The remaining point to be considered, is, whether the purchasers under the order of the *Orphans' Court* are likewise bound to contribute? These purchasers, I acknowledge, appear to me to stand in a very different light from the voluntary purchasers from the eldest son. The law, for the benefit of the families and creditors of persons dying intestate, has vested the *Orphans' Court* with a power to direct the sale of certain parts of the intestate's real estate for the payment of his debts. The same law has directed the means of information to be given to the Court, to prevent imposition and the unnecessary dismemberment of the real estate. The power given to the *Orphans' Court* by this act is very great, and ought to be discreetly exercised; but when the sale is made under their order, it is certainly a good one. The administrator is vested with as complete a power to sell the specified part of the real estate, as he has by the common law to sell the personal; and the purchasers from him ought to hold as securely in the one case, as the other. To say, that, because the administrator is to exhibit upon oath an account of the debts, therefore the purchasers are to look to the payment of those debts, is in effect saying, that the purchasers are to look to the legal exercise of the power vested in the *Orphans' Court*, who may, unquestionably, impose such terms upon the administrator, as are necessary to secure to the creditors and children, the consideration money arising from the sales; and such security has, in fact, been required in many instances by the *Orphans' Court* in *Pennsylvania*. Besides, if the purchaser is to look to the payment of the debts, he must, likewise, look to the other objects for which the land is to be sold; that is, the education and maintenance of the children, and the proper improvement of the residue of the estate; which no law founded in reason could require.

The case of these purchasers, however, is not regularly before the Court; their lands have not been taken in execution, neither are they comprised within the rule.

The rule, as it stands, must be discharged.

PRINGLE *v.* M'CLENACHAN.

THIS cause being referred, a report was made in favour of the Plaintiff, to which the following exceptions were filed by the Defendant:

1. For that the Referees have entirely omitted to charge the Plaintiff *John Pringle*, with the sum of £ 146 specie, for a loss on a Policy of Insurance that he underwrote to the Defendant, *Blair M'Clenachan*, upon the Brig *Nancy*, *Richey*, master, on a voyage from *Cadiz* to *Philadelphia*, in 1775.

2. For that in the month of *December*, 1776, there was a balance due from *John Pringle* to *Blair M'Clenachan* of £. 2455 13 4, as appears by the account current furnished the Referees;

and yet the Referees, by continuing down the subsequent items of account in *Continental Money*, to *August*, 1780 (when they struck a balance of £. 21191 13 0, *Continental Money*, at 70 for one) have reduced the balance of £. 2455 13 4, *Specie*, due to *Blair M'Clenachan* in 1776, by a scale of depreciation of 70 for one; so that instead of £. 2455 13 4½ *Blair M'Clenachan* has credit for about £. 35 1 8, *Specie*. 1789.

3. For that in an item of £. 6403 17 8, *Continental Money*, on a transaction of *November*, 1778, to the debit of *Blair M'Clenachan*, they have omitted to charge him with that sum in *November*, 1778, and reduce it by the scale of 70 for one, as they did the balance in *August*, but have taken that single item out of the general, mass of the account, which amounts to upwards of £. 350,000, *Continental Money*, and reduced it by a scale of 6 for one; which, upon their own principles, will turn to the disadvantage of *Blair M'Clenachan* £. 975 16 7, *Specie*.

4. That *Blair M'Clenachan*, in *September*, 1777, drew a bill of exchange on *Newry*, payable in *London*, for £. 200 *sterling*, in favour of *John Pringle*, which was protested; and the Defendant, *Blair M'Clenachan*, never had notice thereof, until the latter end of 1778, or beginning of 1779, and the Referees have charged the Defendant for the same, the sum of £. 656 19 3, *Specie*, and by reason of the Referees having scaled the aforesaid balance of £. 21191 13 0, at 70 for one, the said *Blair M'Clenachan*, has to his credit for the said bill only the sum of £. 8 11 5, *Specie*.

After argument, THE PRESIDENT delivered the opinion of the Court as follows:

SHIPPEN, *President*:—The Court have deliberately considered this case, and are unanimously of opinion, that the Referees, although men of knowledge and integrity, have hastily adopted a principle not warranted by law, which, if sanctioned by this Court, would be productive of manifest injustice.

The accounts that had been exhibited by one party to the other, were certainly evidence against him who exhibited them, as to the articles which they contained, but could not be considered as evidence, much less conclusive evidence, of what was not stated or distinguished in them, I mean, the value of the specie and depreciated money. This appears to have been a principal subject of dispute between the parties, and ought to have been open to discussion before the Referees. Yet, under the idea that this was conclusive evidence, they have totally refused to consider the items of the account as to their real value, or to exercise their judgments upon them; but, by applying a certain rate of depreciation to the balance of the whole account, they have involved a large sum of hard money in a depreciation of seventy for one. They have also scaled sums which had been omitted in the accounts, in a very different manner from what they have done other advances made about the same time, by which an unequal measure of justice is dealt out to the parties.

1789. The principle that the Referees adopted, having been taken up before it could be known on which side it would operate either beneficially or injuriously, they are not chargeable with any designed partiality; but it was surely too hazardous and uncertain an experiment, to be a proper foundation for doing equal justice.

Although the Court, in the present instance, have entered further into the merits of the case, than they usually do on reports of Referees, they do not think that they depart from the spirit of former decisions, as they ground their judgment upon the conduct of the Referees in declining the consideration of the most material subject of the controversy; and that too, upon a mistaken principle, leading to real injustice to one of the parties.

Let the Report be set aside.

APPENDIX.

The following is the opinion of Mr. Justice RUSH, *delivered in the case of Purviance, et al. v. Angus, (ant.* 180.*) I received it too late for insertion in its proper place; but, I hope, it will be here acceptable to the Public.*

PURVIANCE et al. *v.* ANGUS.

RUSH, *Justice*:—As my opinion differs from that of the Court just delivered by THE CHIEF JUSTICE, I will give the reasons of my dissent somewhat at large.

A libel has been filed in the Court of *Admiralty* for the State of *Pennsylvania*, on behalf of *John Purviance*, *Joseph Dean*, and *Benjamin Harbeson*, against *John Angus*, setting forth and charging, that the said *John Angus* was duly appointed Master and Commander of the brig *Hibernia*, the property of the Libellants, bound on a voyage from *Philadelphia* to the port of *Oratavo* in the island of *Teneriffe*; that on his voyage aforesaid, the said *Angus*, *without any probable cause of capture*, and with a view to his own private interest and emolument, *did combine with* certain malefactors, and take the brig *Betsey* out of the possession of *Silas Talbot*, the said brig being at that time a prize to the said *Talbot*, and that *Angus knew she was prize to him*. The libel further charges, that *Talbot* hath recovered £. 4000 against the Libellants for the trespass and injury aforesaid; and concludes with praying, that, as the Libellants have been compelled to pay that sum of money, through the misconduct of *Angus*, their Captain, they may be enabled to recover from him a full equivalent.

To this libel an answer hath been filed on the part of *Angus*, in which he explicitly denies his taking the *Betsey* on the high seas *without authority* from his owners, and *without probable cause*. He also utterly denies, that he knew the brig *Betsey* had been taken by *Talbot*, and that he had any intention to defraud *him*, or his (*Angus*'s) owners.

A variety of depositions and exhibits have been produced in the cause, and the Judge of the *Admiralty* hath pronounced a decree in favour of *Angus*, the Respondent.

From this sentence an appeal hath been brought by the Libellants to this Court, the highest in the State, having the ultimate and superintending power to correct the errors of all inferior tribunals.

It is right and proper before we examine the evidence, accurately to state the question in controversy.

We are not now to decide, generally, whether Captains of vessels are not responsible to their owners for neglect of duty, or breach of trust; it being admitted on all hands, that the master may sue his servant for any breach of trust or confidence. If a shepherd, by his negligence, suffer my sheep to be drowned; or should my cattle, through the negligence of my servent, commit a trespass upon my neighbour; the shepherd and servent are both liable in these cases. And, in the latter case, I am responsible over to my neighbour for the injury he receives through the neglect of my servant. *Doctor & Student* 37. *Noy.* 109. 5 *Co.* 13. 14.

Nor are we now to enquire, whether *Angus* be responsible to *Silas Talbot* for a trespass. I admit that he is clearly so; and that no defence he could make, founded on ignorance, accident, or mistake, could avail him on such suit by *Talbot*. If *Angus* joined in the trespass, it is immaterial to *Talbot* what were his views, or whether he did it intentionally, or not. If I hurt a person through negligence, it is no justification in an action of assault and battery. *Buller*, 16. And there is a case in one of the books, where a gun went off by accident, and wounded a person, and it was held that trespass lies. It is to no purpose, therefore, and wide of the present question, to cite authorities to prove that in trespass all are answerable. Whether *Angus* shewed more or less zeal; whether he did all he could, or not; are useless enquiries at this time. In trespass all are liable; and this rule would apply on a suit by *Talbot* against *Angus*, even though the trespass might appear, on the part of *Angus*, to have been incautiously, or unintentionally, committed.

The question before the Court is a special one, resting on its own *peculiar circumstances*, and not involving in it the examination or adjustment of any general principles of law. But before I proceed to state what I take to be the question, I will make a few previous observations, on the doctrine of responsibility, so far as the same is applicable, or necessary, at present.

The owners, as well as the captains of vessels, are, by the civil law, liable for trespasses committed on the sea. The owners are liable on the principle, that the captain is their servant, bound to obey their orders, and to pursue their instructions: a confidence or trust is reposed in him, that he will conduct himself agreeably to the principles of integrity and good faith; and that he will be guilty of no outrage upon others, or of any criminal neglect whatever. By rendering the owners responsible for the captains, the law hath laid them under the strongest obligations to employ none

but men of skill, capacity and integrity, to navigate their vessels. Perhaps, too, the principle in part received its establishment, from an apprehension, that the commander of the vessel might not be of sufficient ability to compensate for the injury committed by him. In all cases of spoliation, both captain and owners are equally liable to the party wronged.

But what is the nature of the contract between the owners and the captain? It is either general, or special. It is either created by the law, or by the parties themselves. A commander of a vessel, on going to sea *without any* instructions, is bound to govern himself by law; and, in such case, if his owners are injured through his misconduct, he is certainly responsible again to them. This duty, however, which the law imposes upon the commander of a vessel, may be altered by his owners. They may, for example, order him to take and seize the vessel of a friend; and, in case of his compliance, both he and his owners will be responsible to that friend: but the captain, in this instance, will not be liable to his employers, because he acted according to instructions. The rules of responsibility, therefore, are not reciprocal. The owners may be liable to a person injured, and it will not thence follow, that the captain is answerable again to his owners. These observations are made to refute a very improper inference, that because a captain has injured a third person, for which the owners are liable, that, therefore, the captain is again responsible to the owners.

The question then before the Court is this: Is *Angus*, (who actually committed a trespass on the property of *Silas Talbot*, in conjunction with captains *Prole* and *Thompson*, and whose owners, the present libellants, have since been compelled to make compensation to *Talbot* for the trespass of *Angus*,) responsible to his owners, for the monies paid by them on account of the said trespass, under all the circumstances of the case?

This I take to be a fair state of the question; and the answer must depend, *first*, upon the evidence, and *secondly*, upon the law.

I have stated in the question, that *Angus* committed a trespass. This appears evident from his signing the orders, and from his putting two sailors on board the *Betsey*, to assist in navigating her into port: Unless, therefore, it can be shewn, that *Angus* was imposed upon by his comrades, *Prole* and *Thompson*, to act in this manner; and that he was authorized to place a reasonable confidence in them, the decree of this Court ought to be against him. In other words, unless he can shew some authority, either express, or implied, for what he did, he ought to be considered in the same criminal point of view with the two other captains.

In the beginning of *September*, 1779, the *Hibernia*, commanded by *Angus*, left the Capes of *Delaware*, in company with Captain *Thompson*, who commanded the *Achilles*, and with Captain *Prole* who commanded the *Patty*. They were all armed, and had *Letters*

of Marque. Upon the 6th and 7th of the same month, the transaction happened which gave rise to the present dispute. *Willian Davis*, a passenger on board the *Patty*, says, that on the 7th, about ten o'clock, A. M. he heard a firing, and saw two vessels engaged in battle, and that at that time, the three brigs, the *Patty*, *Achilles*, and *Hibernia*, were within hail of each other. This firing, if ever heard on board the *Patty*, or the battle seen, must have been on the sixth, and not on the seventh. He adds, that he verily believes that the two other brigs heard the firing also.

In opposition to this evidence, let us contrast the testimony of *James Leach*, the captain, and *John Russel*, the mate, on board the *Betsey*. They both swore, that, at the time the *Betsey* was captured, there was no other vessel in sight but the *Argo;* and they add, that they verily believe, no person did see any other vessel. If they were in sight of *Davis*, *Davis* must also have been in sight of them; and the firm belief of *Leach* and *Russel*, that no vessel was in sight, is at least *equal* in point of proof, to the firm belief of *Davis*, that the *Hibernia* and *Achilles* saw the engagement. It is remarkable too, that *Davis* says, that *Angus* had his boat hoisted out, in which he is contradicted by all the other witnesses, and appears to be under a great mistake.

But I shall wave any further observations on this point; for, though it should be admitted that *Davis*, and those on board the *Patty*, heard the firing and saw the chase, it cannot thence be inferred, that those on board the *Hibernia* did, especially as they swore that they did not. Inattention, noise, and a variety of other causes, might prevent the people on board one vessel, from seeing or hearing what those on board another vessel, did see and hear.

It appears to me, therefore, highly probable, from the evidence before the Court, that *Angus* did *not* on the 6th, see the taking of the *Betsey*. His conduct on the 7th, when he came up to the other captains, strongly confirms this idea. For no less than six witnesses out of the seven, who were present when *Angus* came up (that is, every witness except *Davis,)* expressly mentions, that *Angus* enquired what they had got; and upon being told she was a good prize, he replied, if *she* is a good prize, so must the *sloop* be: and that he further asked, why one of their fast-sailing vessels did not chase her; upon which they ordered him to pursue her, which he immediately did.

Now, it is in full proof, from the evidence of Captain *Talbot*, that the two other brigs had been up with the *Betsey* about an hour before *Angus* came up, and that their boats had frequently passed to and from the *Betsey*. They, therefore, had full information; but *Angus* had not the least knowledge, except what he received from their declaration, that she was a good prize. If then she had been a good prize, of which he had not, at that time, the least reason to doubt, well might he reply, that the *other* vessel,

meaning the *Argo*, was also a good prize. This observation, made at this period of the business, unanswerably shews, that he could not have seen the *Betsey* and *Argo* engaged; for, it is not conceivable that he could be so grossly ignorant and stupid, as to see two vessels engaged in battle, and, at the same time, suppose them to be *both enemies*.

With respect to the idea of the three captains having consulted what to do with the prize, it scarcely merits consideration. *Grove* says, that he does not know on board which vessel the consultation took place; in which he is contradicted by *Davis*, who says it was not on board any *particular* vessel, but that each captain continued on board his own. The truth, however, is that there never was any consultation, and in this all the other witnesses agree.

The orders from the three captains to the prize master, and which are signed by *Angus*, contain a direction to him to get, if possible, into *Delaware*, *Egg-Harbour*, or *Chesapeak*: "*for fear of the sloop Argo's falling in with you, if you go to New-England.*" From these expressions, it has been contended, that *Angus* was privy to the whole transaction; but I do not see the thing in that point of view. *It is possible* that he signed the orders without considering attentively the meaning of the words, believing, at the same time, that his comrades, who had made the necessary enquiries on board the *Betsey*, had their reasons for inserting them. *It is certain*, that he thought the *Argo* an *enemy*, and as such pursued her. He might, therefore, very naturally have supposed the other captains had reason to believe the *Argo* was bound to *New-England*: and that on this account they had inserted those words in the orders.

What, then, is the nature and history of the present transaction? Three vessels, commissioned as *Letters of Marque and Reprisal*, being about to sail at the same time from the port of *Philadelphia*, the owners of the *Hibernia*, give *their* captain orders to *cruise* with the other two. He does so; and, in the course of their united operations, he is deceived and misled by them in such manner, as to concur with them in committing a trespass. Had *Angus* been directed, generally, to cruise, the case *might have been* different; for, then every degree of confidence reposed in his associates, must have been at his own risque. But *Angus*, being expressly authorized to cruise with the two other vessels then sailing to the east, any act, or event, which was likely to happen on a joint cruise by the three vessels, or which might have been rationally expected in the usual course of things, was as much authorized, as the cruising itself was. Every thing usually done by persons jointly cruising, is implied in the authority to *Angus* to cruise with the others. The owners themselves have laid the foundation of the trust, or confidence, that he reposed in *Prole* and *Thompson*, and should, therefore, alone suffer. The conduct of *Angus* seems to be clearly warranted by the rules and maxims that invariably govern the commanders of vessels, when

they act in conjunction with others on a cruising voyage. I perceive neither *crassa negligentia*, nor *lata culpa* in his behaviour; and I take the law to be, as stated in 4 *Burr.* 2060, that he is not answerable unless in those two cases. It is preposterous to say, that he ought *not* to have credited *Prole* and *Thompson*, when he was ordered to join with them on a cruise. Hard is the doctrine, that a servant, who apparently acts in the best manner for the interests of his master, should be liable for unavoidable failures, especially when they originate, not in himself, but in others: It is sufficient to deter all men from accepting a trust.

This authority to cruise with *Prole* and *Thompson*, certainly *means something:* but, if it will not justify *Angus*'s conduct on this occasion, it is totally insignificant and void; and an *authority* to cruise with others, is an authority to do nothing; that is, no authority at all.

However disposed to concur with my Brethren in this cause, I have not been able to do it. Unanimity in Courts of Justice, though a very desirable object, ought never to be attained at the expence of sacrificing the judgment,

Upon the whole, as it appears to me, *that Angus did not combine* with the other Captains to take the *Betsey* out of the possession of the *Argo;* and that he acted such a part, as he thought would promote the interests of his owners; my opinion is, that the decree of the lower Court should be affirmed: But a majority of this Court entertaining different sentiments, it must nevertheless be reversed.

INDEX.

ABATEMENT.

WHAT is a reaſonable time to renew an action after abatement; or to proſecute it upon the foundation of the old writ, where there has been no abatement. *Page* 412.

See *Practice. Action.*

ACCOUNT.

See *Action.*

ACTION.

The Court will not in one action enquire, upon motion, into the merits of another. 127

An action for money had and received, &c. is a liberal action, and will lie in all caſes where, by the ties of natural juſtice and equity, the Defendant ought to refund. 145

But where a party might with good conſcience receive the money, although he could not recover it at law, he who voluntarily paid it, cannot in this action compel a return. *ibid.*

The Court will enquire into the cauſe of action in the caſe of Foreign Attachments, as they do in caſes of *Capias*. 154

There is no case which gives a creditor an action againſt the debtor of his debtor: there is no privity between them. *ibid.*

A writing under ſeal cannot be given in evidence, to ſupport an action of *Aſſumpſit* upon a promiſſory note. 208

An action will not lie in a common law Court, where the queſtion ariſes from the neceſſary and immediate conſequences of a veſſel's being taken *as prize*. 218

In an action for money had and received, &c. the Plaintiff ſo far confirms the Defendant's act, as that he cannot gainſay the right to receive the money, and can recover no more than was actually received. 222

In an action of debt brought upon a bond, and where the iſſue is joined on a plea of *payment*, the Jury may, and ought to, preſume every thing to have been paid, which *ex æquo et bono*, in equity and good conſcience, *ought not to be paid*. 260

In an action of *account* between partners, if theſe facts are proved, that a partnerſhip exiſted, that the Defendant was the acting partner, and that he received any part of the ſum, from any of the perſons mentioned in the declaration, the Court will uniformly oblige him to account. 339

The mere ſale and delivery of a promiſſory note, without any indorſement or aſſignment, will not be ſufficient to maintain an action brought by the purchaſer in his own name, where no other conſideration for an *Aſſumpſit* is laid in the declaration. 370

A perſon whoſe eſtate was confiſcated during the late war, under an act of the Legiſlature of *Connecticut*, for adhering to the *Britiſh* government, cannot ſue here to recover a debt, veſted by that confiſcation in the State of *Connecticut*, although no proceedings were had on the part of the State, to reduce the debt into poſſeſſion, before the treaty of Peace. 400

What is a reaſonable time to renew an action after abatement, or to proſecute it upon the foundation of the old writ, where there has been no abatement. 412

Aſſumpſit for money had and received, &c. will lie to recover back the conſideration money given for the purchaſe of lands; and deeds or other writings which are not the immediate foundation of the ſuit, but only tending to it, may be given in evidence, 429.

Letters of Adminiſtration granted by the Archbiſhop of *York* in the kingdom of *England*, are not of ſufficient authority to maintain an action here. *Page* 456
See *Practice. Alien. Aſſignment. Conſolidation. Covenant. Lis Pendens.*

ACTS OF ASSEMBLY.

An act of Aſſembly of the late Province was not deemed to be repealed by the King and Counſel, till notification here. 9

It is fairly to be inferred from the general tenor of the act of Aſſembly for the revival of the laws, that the Legiſlature thought, that the ſeparation from *Great Britain*, worked a diſſolution of all government. 58

See *British Statutes.*

ADDITION.

J. B. of *Weſt Bradford* was required by proclamation to ſurrender, &c. by the name and addition of "J. B. of *Eaſt Bradford* townſhip:" and it was held to be fatal. 60

ADMINISTRATOR.

On the plea of want of aſſets, in an action againſt an executor by a reſiduary legatee, auditors ſhall be appointed *ex tempore*; and it is not ſufficient to object, that the executor's accounts have been before ſettled by a reference. 164.

Payment to an executor or adminiſtrator of a deceaſed partner can be no ſatisfaction to the ſurvivor, who has the ſole right of ſuing for, and of receiving the monies due to the company. 250

Although an executor by paying money over to his co executor, who becomes inſolvent, would be chargeable if there were creditors, and a deficiency of aſſets to ſatisfy them, yet he is not anſwerable to legatees. 312

A creditor taking a bond from the executors or adminiſtrator of his deceaſed debtor, diſcharges the old debt, *in not.* 347

Letters of adminiſtration granted by the Archbiſhop of *York* in *England*, are not a ſufficient authority to maintain an action here. 456

See *Reference.*

ADMIRALTY.

The *Delaware* is within the Admiralty juriſdiction. 49

A Court Admiralty cannot carry an agreement into ſpecific execution, nor give damages for the breach. *ibid.*

The owners of *Letters of Marque* are reſponſible for injuries committed on the high ſeas, by the commanders ſent out by them; at leaſt to the value of the veſſels. 95

In caſes of capture from enemies, perſons in other veſſels acquire no right, merely by ſeeing the capture made. *ibid.*

In what caſes the Admiralty has cognizance. *ibid.*

In what caſes appeals from the Admiralty to the High Court of Errors and Appeals, are regular. *ibid.*

The maſter of a ſhip is anſwerable over to his owners, where they have been obliged to pay a third perſon for damages ſuſtained by his miſconduct; but the Court, under favourable circumſtances, may reduce the *quantum* of damages below what the owners have paid. 180

It is a wrong poſition, that a maſter of a ſhip is not anſwerable for an error in judgment, but only for a fault of the heart, in *civil* matters. *ibid.*

Where the queſtion to be tried, though not directly a queſtion of prize is yet a queſtion ariſing upon the immediate and neceſſary conſequence of a veſſel's being taken as prize, it is ſolely and excluſively of Admiralty juriſdiction, and an action will not lie in a common law Court. 218

See *Maſter and Servant. Damages.*

AGENT.

There muſt be ſome ſatisfactory proof of a Defendant's being actually an agent, before the Court will allow him to be ſworn, under the act of Aſſembly, to identify the money in diſpute. *in not.* 224

A confidential agent cannot excuſe himſelf on that account from being a witneſs againſt his conſtitutent. 439

See *Witneſſes. Inſurance.*

AGREEMENT.

See *Frauds and Perjuries. Inſurance.*

ALIEN.

An alien enemy has no right of action during a war: but the rights which the subjects of either power had against the other, are revived at the end of it. 71

See *Action. Law of Nations.*

AMBASSADOR.

See *Law of Nations.*

AMENDMENT.

A *Sci. Fa.* was amended by the record, substituting *September* Term, 1782, for *December* Term. 133

Verdict in ejectment amended by adding, "and for the residue they find for the Defendant." *ibid*

The teste and return of an *alias Venditioni* amended by the attorney's precept on which it issued. 197

After report, the rule of reference was amended by the agreement filed, so as to insert the name of *Lewis*, instead of *Lewis*. 379

See *Error.*

APPEAL.

See *Admiralty. Damages. Ejectment. Justices.*

ARREST OF JUDGMENT.

See *Judgment.*

ASSAULT AND BATTERY.

Striking any thing attached to the person, as a cane, is a battery. 114

See *Alien. Law of Nations.*

ASSIGNMENT.

The assignee of a bond takes it at his own peril, and stands in the same place as the obligee; so as to let in every defalcation which the obligor had against the obligee, at the time of the assignment, or notice of it. 23

The only intent of the act for the assignment of bonds, &c. is to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment. *ibid.*

After a *bona fide* assignment of a simple contract debt, the Court will not allow the nominal Plaintiff to discontinue an action brought to recover it, to the use of the assignee. 139

The assignee of a simple contract debt cannot maintain a suit in his own name. 268

A bond payable to L. S. with a memorandum subjoined, that it was for the use of J. P. was assigned by J. P. to J. L. And it was adjudged, that this was not an assignment within the Act of Assembly; and that J. L. could not maintain an action, in his own name, against the obligor 444

A subsequent assignment of the same bond, by J. L. to G. T. is no more than an assignment of J. L's equitable interest. *ibid.*

The covenant by the word *assigned*, extends only to this, that the assignee should receive the money from the obligor to his own use; or, if the obligee received it, that he would be answerable over for it to the assignee. *ibid.*

See *Covenant. Discontinuance.*

ASSUMPSIT.

See *Action. Promissory Note.*

ATTACHMENT.

See *Contempt. Foreign Attachment. Domestic Attachment. Costs.*

ATTAINDER.

See *Action. Treaty.*

ATTORNEY.

See *Letter of Attorney.*

AUDITORS.

See *Practice. Administrator.*

AUTHORITY.

See *Practice. Bill of Exchange. Letter of Attorney.*

AWARD.

See *Reference.*

BAIL.

REcognizance of bail only binds the lands from the date of the judgment on the *Sci. Fa.* against the bail, and not from the time of entering it. 131

The proof of a debt necessary to hold to bail. 159

The 12 *G.* 1. respecting proof of debts to hold to bail, was not in force, nor practised under before the Revolution. *ibid.*

See *Foreign Attachment. Justices. Privilege. Practice. Bankruptcy.*

BANKRUPTCY.

An insolvent debtor must petition the Court before the adjournment, or he will not be entitled to his discharge at that Term. 142 149

A person discharged by a special insolvent act of *New Jersey*, the act being local in its nature, and local in its term, is not thereby protected from his creditors here. 136

A discharge under the insolvent laws of *Maryland*, extends to protect the person of an insolvent debtor in this State. 229. 294

The judgment of a foreign Court discharging the debt, would, for that purpose, be recognized here; but an inchoate proceeding to obtain a discharge, will not be sufficient to excuse an insolvent debtor from giving bail 368

The rational and legal construction of the 30th section of the Bankrupt Act, appears to be, that no judgment creditor, who has not levied his execution, shall receive any benefit from his judgment, as to the estate or effects of the bankrupt, vested in the Commissioners of Bankruptcy by the act, to the exclusion or prejudice of the creditors at large but must be put upon the same footing with them. 273

Yet, as to liens which do not affect the general creditors, he will have the benefit of them in the same manner, as if the act had never been made. *ibid.*

It would defeat the express intent of the bankrupt law, if a prior judgment creditor could come in under an execution, which, being issued upon a subsequent judgment against a bankrupt, was levied before the act of bankruptcy committed. *ibid.*

In that case, the creditor who sues out the execution is entitled to the money levied. *ibid.*

Upon a trial at law, the creditor of a bankrupt may give evidence to controvert the trading, bankruptcy, and conformity; and the certificate is not conclusive proof of all the proceedings before the Commissioners. 381

Though the bond of the petitioning creditor is given for a debt contracted prior to the Act of Assembly, and with a view to take out a commission, the Court would be unwilling, on that account alone, to invalidate the certificate. 388

A petition subscribed by one of two partners, in the name of himself and partner, is sufficient for the purpose of taking out a commission, on a partnership demand against the bankrupt. 389

To found a joint commission upon a fictitious partnership, is certainly *unfair* within the meaning of the act of Assembly. 390

But if a partnership did exist at the time of taking out the commission, a previous assignment of the partnership effects for the payment of creditors, or the smallness of the quantity of the goods in their store, cannot invalidate the commission or defeat the benefit of the certificate. *ibid.*

Quere. Whether the flight of a stranger to his own home, in another State, amounts to an act of bankruptcy, within the meaning of the act of Assembly? *ibid.*

BILL OF EXCHANGE.

Where a man voluntarily pays the damages on a bill of exchange, without waiting for a protest for *non payment*; and the Defendant might with justice receive them, the money cannot be recovered back 147

The Court, in an action on a bill of exchange, will allow the Plaintiff to strike out a special, as well as a general indorsement on the bill. 193

A protest for non-payment must appear under a notarial seal. *ibid.*

Possession of a bill of exchange is evidence of an authority to demand payment of its contents. *ibid.*

A bill of exchange without the words, "or order," or other words of negotiability, is not indorseable over, so as to enable the indorsee to bring an action on it, against the acceptor, in his own name. 194

Notice of protest ought to be given in a reasonable time; and, by not giving it, the holder takes the loss upon himself. 234. 270

The reasonableness of notice of a protest must, in *Pennsylvania*, be left to the Jury, as a question of fact, and not of law. 254

A bill of exchange, neither paid nor received in satisfaction of a precedent debt, but upon condition of its being honoured, will not entitle the drawee to 20 *per cent.* damages, in case of its being protested for non-payment. 261

See *Promissory Note.*

BOND.

See *Assignment. Bankruptcy. Payment.*

BRITISH STATUTES.

No act of Parliament made in *England* previously to the settlement of the Province of *Pennsylvania*, was extended here, unless by acts of Assembly, adjudications of Courts or established usage. 67. 74 75

The Common Law of *England* has always been in force in *Pennsylvania*; but all statutes made since the settlement of the Province, have no force here, unless the Colonies are particularly named. 67

See *Frauds and Perjuries. Bail. Limitations. Trial.*

CAPTURE.

See *Admiralty. Insurance.*

CARGO.

See *Customs.*

CERTIFICATES.

See *Bankruptcy.*

CHEAT.

See *Indictment.*

COMMISSION.

See *Costs.*

COMPTROLLER GENERAL.

THE power of the Comptroller-General in the settlement of accounts against the Commonwealth, is expressly limited by the act of Assembly, to claims for services performed, monies advanced, or articles furnished, by order of the Legislature, or the Executive Council. 263

He has no right to adjudge a compensation from the State for *damages* which individuals may have suffered, in the course of military operations for the common security and defence. *ibid.*

Where he has no jurisdiction originally, the *Supreme Court*, on appeal from his decision, can have none. *ibid.*

See *Supreme Court.*

CONFISCATION.

See *Customs. United States.*

CONSIGNMENT.

See *Foreign Attachment.*

CONSOLIDATION.

See *Reference.*

CONTEMPT.

It is a contempt of the Court to withhold a *Venire*. 29

It is a contempt, for which an attachment lies, to endeavour to prejudice the public mind in writings respecting a cause depending in Court 319

When the Defendant is present, on a rule to shew cause why an attachment should not issue against him for a contempt, the Court will not make he rule absolute; but proceed to give judgment for the offence. *ibid.*

See *Reference.*

CONTINUANCES.

See *Practice. Limitations.*

CONTRACT.

In what cases the relation of an inferior and superior officer, will bind the latter to discharge the contracts of the former. 140

See *Covenant.*

CONTRIBUTION.

See *Intestate.*

COVENANT.

A covenant to repair, and deliver up the demised premises in good order and repair, runs with the land, and shall bind the assignee as much as the lessee, even if the assignee were not named by express words, on account of the privity. 210

Covenant to deliver up the premises in good order on the 1st of March, 1778, but the same being taken possession of by an alien enemy, and held until the end of the Term, and afterwards: It was adjudged, that the assignee of the lease was excused from performance of this covenant; 1st, Because a covenant to deliver up the premises in good repair, against an act of God or an enemy, ought to be special and express; 2dly, Because the Defendant had no consideration, no premium, for the risque; and it was not in the contemplation of either party; and 3dly, Because equality is equity, and the loss should be divided; —he, who had the *term*, will lose the

temporary profits of the premises; and he, who has the reversion, will bear the loss done to the *permanent* buildings 210

Where there is a ground rent deed, containing an express covenant on the part of the lessee, for the payment of rent, and he assigns over the premises; although the lessor accept rent from the assignee, covenant will lie for him against the lessee to recover subsequent rent. 307

CONVEYANCE.

See *Deed.*

COSTS.

The act of Assembly is positive, that, upon the reversal of a judgment in the High Court of Errors and Appeals, each party shall pay his own costs. 292

Costs not allowed where the debt is reduced under £ 10 by a direct payment, and not by set-off on the trial. 308. 457

What costs will be allowed on executing a commission. 310

Where witnesses, upon an attachment for not obeying a *subpœna*, proved their absolute incapacity to attend, the Court directed the costs of the attachment to abide the event of the suit 340

The Jury ought to include the costs of the replevin, in their verdict in an action brought upon the replevin bond 440

See *Prosecutor.*

CURRENT MONEY.

Current and *Lawful* Money are synonimous. 126

The legal currency of *Pennsylvania* was continental money. *ibid*

A bond payable in "lawful current money of *Pennsylvania*" must be taken to relate to the money issued by Congress. *ibid.*

Current lawful money, by the positive words of the act of Assembly, means such money as is current at the time of entering into the contract. 175

See *Payment.*

CUSTOMS.

Where the captain of a vessel is obliged by law to deliver a manifest of his cargo, he does not comply, unless he exhibits a true and accurate one. 205

Every thing put on board of a vessel, is, generally speaking, comprehended in the description of her cargo. 205

What unlading of goods will be cause of confiscation. *ibid.*

The want of knowledge, or of participation of the owners, will not prevent the confiscation of a vessel, from which goods have been unladed before a due entry at the custom-house. *ibid.*

DAMAGES.

ON an appeal from the Admiralty, the High Court of Errors and appeals, having reversed the decree of the Court below, granted a rehearing upon this point, whether the High Court of Errors and Appeals had a discretionary power with respect to damages? which was determined in the affirmative. 185

In a suit against the captain of a privateer, brought by the owners of the vessel, after a recovery against them for his misconduct, in seizing a ship and cargo as prize, which were not so, the High Court of Errors and Appeals did not make the amount paid by the owners, the measure of damages against the captain; but, upon some favourable circumstances appearing for him, they decreed considerably less. *ibid.*

See *Comptroller General.*

Bill of Exchange.

DEED.

Baron and *Feme* joined in a conveyance of the *Feme*'s lands to trustees for certain uses; they afterwards acknowledged the deed before a Justice of the Common Pleas who indorsed upon the deed, that the *Feme* was examined apart from her husband, and declared that she had voluntarily executed it, &c. *Adjudged* to be a good conveyance, upon account of the usage. 11. 17

An *ancient* deed, of sixty years date, allowed to be read in evidence, although possession had not gone along with it, on proof of the hand writing of one witness who was dead, and the other not known. 14

The recital of one deed in another, is only evidence against him who claims under it. 67

Interlineation, if made after execution of a deed, will avoid it, though in

an immaterial point; and the presumption is against its having been made before. 67

Sheriff's deed of sale, under a *Ven. Exp.* read in evidence, though not recorded, the acknowledgment in Court, and the registering of it in the Prothonotary's office, being a sufficient recording within the act. 68

Deed dated *before*, but not recorded 'till *after* a sheriff's deed, allowed to be read in evidence 69

The Court cannot hinder the reading a deed under seal; but what use will be made of it is another thing. *ibid.*

F. V. devises lands unto his eldest son *A.* in fee tail, with remainder in fee to all his other children; and afterwards by deed "in consideration of natural "affection, he gives, grants, &c. fully, "freely, absolutely, and clearly, the "same premises, to his son *A. V.* to-"gether with all the rights, rules, in-"terest, claim, and demand whatsoev-"er, which he then had in the said "granted premises, or any part there-"of, *Habendum* unto him only the said "*A. V* without any further condition, "&c." *Adjudged* 1st. That this deed is a covenant to stand seized to uses: 2d, That since the stat. of 27 *H.* 8. c. 10 no inheritance, in a covenant to stand seized to uses, or other deed to uses, can be raised, or new estate created, with out the word *heirs*: and 3d, That there are no words in this deed, technical or relative, that can raise a fee; so that *A. V.* had only an estate for life in the premises. 137

See *Partners. Evidence. Devise. Covenant. Mortgage.*

DEVISE.

Devise to *the first heir male of F. S.* when he shall arrive at the age of 21 years, he paying to A and B the daughters of J. S £. 40. each: After the devisor's death J S. had a son, who attained the age of 21, and paid his sisters the £. 40. each: *Adjudged* that the testator's intent was that the *first son* of J. S should take the estate. 4

Devise to trustees, to the intent, that *after my wife's decease, or in case she shall marry*, they should sell, and divide the money arising from the sale among the testator's children, when they severally attained the age of 21 years, or were married: *Adjudged*, that this was a *vested legacy* in one of the testator's children, who attained the age of 21, married, and died intestate, and without issue, *in the life time of the widow*, who never had married again, but after whose death, the trustees sold. 8

"I devise the residue of my estate to J P. during the term of his natural life, and if he leaves lawful issue, then I give my real estate unto such issue: But in case of his dying without issue, or they dying under 21, then I devise all my real estate unto A. J. his heirs and assigns, on condition that he, or they, pay, &c." *Adjudged*, that J. P. took an *estate tail*, which was forfeited by his attainder. 47

The word *transfer* being used among the disabilities to which *non jurors* are subjected by the act of Assembly, a non-juror is incapable of *devising* lands. 170

Devise of lands to the testator's son John, *when* he arrives at the age of 21 years, to hold to him, his heirs, and assigns for ever, is a *vested* devise; and in case of the death of the son intestate, under age, unmarried, and without issue after the death of his father, his mother surviving him, the estate devised shall not go to his eldest brother as his heir at common law, but be distributed equally among his brothers and sisters. 20. 175

T. B begins his will, "And as to what worldly estate I am blessed with, I dispose of as followeth:" and then, he devises, 1st, "To his son J. B. a house and plantation where the testator then dwelt, &c to have and to hold unto the said J. B *his heirs and assigns forever*, he paying, &c." 2dly, "To his wife M. a certain piece of land, bounding, &c. Also, he gave his wife one third of such moveable estate as should remain after the payment of his debts, funeral expences, and legacies, *which should be in lieu of her dower or thirds* of his estate: And 3dly, after bequeathing some legacies, he directs his house and land by the mill to be sold by his executors: *Adjudged*, that the wife M. had only an estate for life in the piece of land devised to her. 226

See *Deed. Will. Dower. Intestate.*

DISCONTINUANCE.

The Court refused to allow the nominal Plaintiff to discontinue an action,

it being proved, that it was brought in his name for the use of another, upon a *bona fide* assignment of the debt. 139

See *Practice.*

DISTRESS.

See *Replevin.*

DISTRINGAS.

See *Practice.*

DIVORCE.

See *Practice.*

DOMESTIC ATTACHMENT.

The creditors under a domestic attachment having made a dividend before notice of a debt due to the Commonwealth, under the circumstances of the case, the Commonwealth was not afterwards entitled to full payment. 151

What constitutes an *inhabitant* within the attachment laws. 152, 158

A judgment has relation to the first day of the Term, so as to exclude a domestic attachment in favour of the judgment creditor. 450

See *Foreign Attachment.*

DOWER.

Dower cannot be barred by a collateral recompence; the devise of any thing to a wife cannot be averred to be in bar of dower, because a will imports a consideration in itself; and the devise, without other matter, is to be taken as a *benevolence*, and the devisee considered as a *purchaser*. 417

The demandant in dower is not estopped from recovering therein, by an action of partition which she had before brought, for dividing lands under a devise in her husband's will, and in which it was acknowledged, that the moiety of the premises, out of which dower is claimed, belonged to the tenants. 418

See *Devise. Partition.*

EJECTMENT.

AN ejectment is almost the only action for trying the title to lands in *Pennsylvania*. 67

A bare perception of profits will not oust a tenant in common; and for the statute of limitations to bar the possession must be adverse. 67

Lessor of the Plaintiff shall not be obliged to shew his title farther back, than from the person who last died seized, first shewing the estate to be out of the Proprietaries, or the Commonwealth. 68

Ejectment may be maintained in Pennsylvania, by the *cestui que trust* in his own name. 72

A sheriff's deed, which did not recite the record, was allowed to be given in evidence of title, without producing the record 94

The Defendant in ejectment must confess *lease, entry, and ouster*, for all the tenements laid in the declaration; confession for a part only will not be allowed. 126

The Plaintiff in an action of trespass for mesne profits, shall not give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration in ejectment. 172

On an appeal from the Regulators of party walls, &c. the question ought to be tried by ejectment. 308

See *Limitations.*

ERROR.

Error was assigned, that "the declaration is for the penalty in a penal bill, but omits to state that the smaller sum was not paid, so that no cause of action is shewn to have accrued to the Plaintiff for the penalty." But it was held, that this want of an averment could not be taken advantage of on error. 461

The Court below having refused to admit the Defendant to read in evidence a copy of an act of Assembly of the State of *Virginia*, printed by the Law Printers of that Commonwealth, and stitched up with a few other acts, in a blue paper cover, it was held fatal on error brought. 462

It was adjudged to be error that the Court below permitted the Plaintiff there to amend his declaration by the writ, after the Jury had been sworn and then had them sworn again, and received their verdict, without consent, without giving the Defendant leave to plead anew, and without an imparlance, or awarding the payment of costs by the Plaintiff. 464

See *Judgment. Verdict. Infant.*

EVIDENCE.

Copy of a deed enrolled in B. R. in *England*, evidence of a title to lands in *Pennsylvania*. 1

Copy from a register of births and deaths of *Quakers* in *England*, evidence to prove the death of a person. 2

In *Partition*, on the plea of *non tenuit insimul*, &c. evidence may be given, that some of the Defendants were not tenants of the freehold, but only tenants at will. *ibid*

The exemplification of a will made in *England*, and certified under the seal of the *Prerogative Court*, may be given in evidence. *ibid.*

Minutes of the commissioners of property may be given in evidence. *ibid.*

The original private book of memorandums of the Secretary of the Land Office, respecting the description of the land originally applied for, was given in evidence *by consent*, on the recommendation of the Court, who thought it a question of great importance. 5

The protest of a master of a ship allowed to be given in evidence 6. 10

A letter from the Receiver General and Secretary of the Land Office, to the Surveyor General's Deputy, was allowed to be given in evidence, as the foundation of the Defendant's title 6

A survey made in pursuance of the above letter, not returned into the proper office, but found among the Deputy Surveyor's land papers, many years after his death, was allowed to be given in evidence, against a regular warrant and survey of a subsequent date, a settlement and possession being proved. 7

The votes of Assembly and minutes of Council, were evidence to prove the time of the notification of the repeal of an act by the King and Council 9

Evidence of a parol declaration of Mr. *Penn*, that the land in dispute was sold to the Defendant, rejected by the Court. 10

Hearsay permitted to be given in evidence to prove *pedigree*. 14

The strict rules of evidence ought not to be extended to mercantile transactions. 16

An account sales allowed to be given in evidence, on proof of the hand writing of the factor, who signed it. *ibid.*

On plea of payment, in an action of debt on a bond, the Defendant may give evidence of a mistake, or want of consideration. 17

No man shall create evidence for himself; therefore, letters written by the lessor of the Plaintiff, to shew that his grant, on which the Defendant made title, was conditional, were rejected 18

The list, commonly called *the list of first purchasers*, was admitted in evidence to prove a grant of 5000 acres from *W. Penn*, by deed, alledged to be lost. 2. 64

The pass of a Justice of *New Jersey* is not admissible in evidence, in a cause respecting the seizure of goods brought into *Pennsylvania* against an act of Assembly. 62

Any deed under seal, when proved, is proper to be given in evidence. 63

A deed sworn to by one witness before a magistrate, who certifies the same is within the rule. 63. 93

A paper copied from the books of the Surveyor's office, stating that a survey had been made, was not allowed to be read in evidence; but the book from which it was taken, was admitted, without shewing any actual survey. 65

On proof that the Defendant in *ejectment* was in under J. P. or his heirs, the lessor of the Plaintiff was allowed to give evidence of the detention of deeds by the heirs of J P and also to read letters written by J. P. *ibid.*

Evidence allowed to be given of the confession of the Defendant, made after the commencement of the suit. *ibid.*

Probate of a will in the Prerogative Court of *Canterbury*, not recorded here, allowed to be given in evidence. 66

Two deeds, both executed in *England*, but only one of them recorded here, were allowed to be given in evidence. *ibid.*

A letter from a third person no way concerned in the title, was offered in evidence to prove under whom he had possession, but refused. *ibid.*

Recital of one deed in another is no evidence, but against the party claiming under it. 67

In forcible entry, &c. title cannot be given in evidence to prevent restitution. 68

An entry made nineteen years ago in the Defendant's books, that a note of 13 years standing was paid, was allowed to be read in evidence, to support the general presumption of payment after such a length of time. 85

A book given in evidence to the Jury, with a direction, that if they thought it a transcript from another book, to pay no regard to it. *ibid.*

A sheriff's deed allowed to be read in evidence, without producing the record. 94

If one of two witnesses to a deed becomes interested, the other must be called, or proof given that he cannot be found; otherwise the deed may not be read in evidence. 123

The register of a ship, certified by the naval officer under his seal of office, admitted to be read in evidence against the Defendants, though the writ, with respect to the Defendant that made the register, was returned *non est inventus*. 141

On an indictment for a nuisance, the Defendant cannot give evidence, that the act charged is beneficial to the public. 150

Parol evidence of the declaration of the grantor, amounting to a confession against himself, though made *after* the execution of a deed, may be given to the Jury. 193. 426

Possession of a bill of exchange is evidence of an authority to demand payment of its contents 193

A writing under seal cannot be given in evidence to support an action of assumpsit on a promissory note 208

An entry in a shop book is not evidence, to charge a man upon a collateral assumpsit, to pay the debt of another. 238

When a confession is given in evidence, all that was said must be stated, and the whole, generally speaking, ought to be taken together, unless circumstances of improbability appear. 240. 392

A judgment in a foreign attachment in a sister state, is not conclusive evidence of the debt in an action here between the same parties. 261

Quære, How far books are admissible (not to prove a charge against a party to the suit, but) to shew a collateral fact, whether a third person was the Defendant's debtor at a particular period? 276

In order to prove that the goods in question were bought of a third person, and not of the Plaintiff, the entry in the books of the third person must be shewn: his clerk's swearing that he had made it, will not be admitted 310

The *proces verbal* delivered into the *Admiralty* at a foreign port, was not admitted to be read in evidence in an action against the underwriters. 317

The protest of a Captain of a vessel made at a distant day, and not at the first port of arrival, was refused to be admitted in evidence. 318

A special verdict in another action upon the same policy, but against different underwriters, was allowed to be read in evidence, upon proof of an agreement of all the underwriters, to be bound by one verdict. 419

In what cases parol testimony is proper to be admitted to explain, and control the operation of a deed. 426

In an action of *assumpsit* for money had and received, deeds, or other writings, which are not the immediate foundation of the suit, but only leading to it, may be read in evidence. 429

A printed copy of an act of Assembly of *Virginia*, printed by the law printers there, and stitched up, with a few other acts, in a blue paper cover, is good evidence to be read to a Jury. 462

See *Deed. Treason. Bail. Ejectment. Grand Inquest.*

EXECUTION.

Execution cannot issue upon a judgment confessed on a bond by warrant of attorney, until the time given for payment of the bond is elapsed. 133

A person committed in execution by a *Justice* for a debt exceeding £10, discharged on a *Hab. Corp.* 135

A person attending Court is not privileged from being arrested on a *Ca. Sa.* 356

A prior judgment creditor, cannot come in under an execution, issued upon a subsequent judgment, against a bankrupt, and levied before an act of bankruptcy: but the Plaintiff in the execution shall have the money. 373

There is nothing in the act of Assembly, which precludes the sheriff from holding an inquest after the return of a *Fi. Fa.* 379

When the judgment of a Justice of the Peace is affirmed upon a removal into the Supreme Court, execution may issue at once, without referring the cause again to the Justice 410

Lands of an intestate are bound for the payment of his debts, and may for that purpose be taken in execution, although the heir may have previously sold and conveyed them to a *bona fide* purchaser. 481

See *Bankruptcy. Intestate.*

EXECUTOR.

See *Administrator.*

EXTINGUISHMENT.

See *Payment.*

FORCIBLE ENTRY AND DETAINER.

IN an indictment for Forcible Entry and Detainer, title cannot be given in evidence to prevent restitution. 68

Wife of the prosecutor in an indictment for forcible entry and detainer may be a witness to prove the force, but only the force. *ibid.*

Motion in arrest of judgment:—1st. That the indictment of forcible entry, &c. stated that "the prosecutor *was seized* in his demesne as of fee," without saying *when*: 2d. That the indictment stated that, "he was *seized* in his demesne as of fee," and "that his *possession* thereof as aforesaid, continued until, &c." which was repugnant. But both objections were overruled. *ibid.*

The proceedings on an inquisition of Forcible entry, &c. were quashed, because the defendant was stated in the inquest to have been *possessed*, but no estate or term was laid. 354

FOREIGN ATTACHMENT.

Rum consigned to be sold on account of the consignor, and to be applied first to the payment of a debt due to the consignee, is not liable to a Foreign Attachment, till the consignee is satisfied.

Property of a sister state is not liable to an attachment in *Pennsylvania*, for a debt due from such state to an individual. *in not.* 77

A man who comes from another place to reside amongst us, introduces his family here, takes a house, engages in trade, contracts debts, and, after some time, runs away with design to defraud his creditors, is such an *inhabitant* as not to be an object of the Foreign Attachment, but of the Domestic Attachment. 152

The Court will enquire into the cause of action in the case of Foreign Attachments, as they do in the case of a *Capias*. 154 219

What constitutes an *Inhabitant* within the meaning of the attachment laws. 158

What proof of a debt is sufficient in a Foreign Attachment, upon a citation to shew the cause of action. 160

After judgment has been regularly entered in a Foreign Attachment, *Quære*, whether it is not too late to move to quash the writ 294

Money paid into the hands of the Prothonotary was attached by the defendant as soon as he paid in; but, on motion the attachment, was quashed. 354

In executing a writ of inquiry upon a judgment in a Foreign Attachment, the defendant is not entitled to produce evidence to the Jury. 377

A shallop attached was directed to be sold as a perishable commodity, upon motion, and positive affidavit of the debt, at the first term. 379

A Foreign Attachment will not lye against an inhabitant of the State, though avowing an intention to emigrate, and actually on his journey for that purpose. 480

See *Domestic Attachment.*

Judgment. Evidence.

FRAUDS AND PERJURIES.

The *English* statute of frauds and perjuries, 29 *Car.* 2. c. 3 does not extend to *Pennsylvania*. 1

But that statute is supplied by an act of Assembly passed 12 *G.* 3. c. 31 *in not.* *ibid.*

The act was made to prevent frauds as well as perjuries; it should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. 427

An engagement that if D. S. would make a conveyance to L. S he would reconvey to a third person, although not in writing, and concerning lands of inheritance, is not, under the particular circumstances of the case, void by the act of Assembly. *ibid.*

See *Evidence.*

FREEHOLDER.

See *Practice. Privilege.*

GOVERNMENT.

IT is fairly to be inferred from the general tenor of the act for the revival of the laws, that the Legislature thought the separation from *Great Britain* worked a dissolution of all government. 5

A formal compact is not a necessary foundation of government. *ibid*

A kind of government independent of *Great Britain*, was administered in *Pennsylvania* before the establishment of its present constitution. *ibid.*

The constitution of *Pennsylvania* was a dissolution of the government as far as related to the powers of *Great Britain*; but not in relation to the powers which had been before exercised by councils and committees. *ibid*

When treason may be committed against a government. *ibid*

Subject means being in subjection to some sovereign power, and is not barely connected with the idea of territory: it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office. *ibid.*

See *United States.*

GRAND INQUEST.

It is improper and illegal to examine witnesses on behalf of the defendant while the charge against him lies before the Grand Jury. 236

GROUND RENT.

See *Covenant.*

GUARDIAN.

See *Orphans Court.*

HIGH COURT OF ERRORS AND APPEALS.

See *Damages.*

INDICTMENT.

AN indictment may be maintained upon "an intent to deceive my liege subjects." 41

Or it will lye for a cheat of such a nature as may prejudice, although it does not charge that any person was actually defrauded. *ibid.*

An indictment lies against a public officer for a cheat in marking barrels of bread as of the weight of 88 lb. each, when, in fact, they only weighed 68 lb 47

An indictment lies for "maliciously, wilfully, and wickedly killing a horse," although secretly, is not charged. 338

See *Treason. Nuisance.*

INFANT.

The appearance of an infant to a suit brought against him, is not a judicial act, and will be fatal on a writ of error. 166

A judgment against an infant may be reversed after full age, except in cases of real actions, and fines and recoveries, which are, in their operation, mere modes of assurance; and the fact must be tried *per pais*, and not by inspection. *ibid.*

See *Orphans Court.*

INFORMER.

See *Prosecutor.*

INHABITANT.

See *Foreign Attachment. Domestic Attachment. Privilege.*

INQUEST.

See *Execution. Foreign Attachment. Writ of Enquiry.*

INSOLVENCY.

See *Bankruptcy.*

INSURANCE.

The defendant underwrote an open policy on the vessel from *Philadelphia* to *Jamaica*; she was taken by the enemy, and afterwards retaken and carried into *Jamaica*; where, by agreement between the captors and recaptors, without going into the Court of Admiralty, she was sold at public sale for one fourth of the sum insured, and bought by the Captain for the original owners, who afterwards acquiesced in the purchase, and now sued for the whole sum insured as a total loss: But, agreeably to the directions of the Court, the Jury only allowed a compensation for salvage, charges, and loss of time. 11

A warranty that "orders will be given that the ship shall not cruise," is not complied with unless such orders are expressly given to the Captain; an implication from the general instructions will not do. 162

An agreement entered into by underwriters to be bound by one verdict, is equally binding on the parties whether made in person, or by a broker mutually employed 419

All such agreements ought first to be entered on the Records of the Court. *ibid.*

See *Evidence.*

INTEREST.

Where money is received, as well as paid, in a mistake, and neither fraud nor surprise can be imputed to either party, interest shall not be allowed in an action to recover the money back. 52

The rule for computing interest on partial payments. 124. 378

Interest shall not be allowed upon an open account for goods sold and delivered. 265. 315

The case in *Douglas* relates only to the *American* trade with *England*, and does not interfere with the general rule. *ibid.*

Money received for another, and retained without the owner's consent, ought to carry interest. 349

INTESTATE.

J. F. having two sons and a daughter, devised a plantation to *Mathias* in fee. *Mathias* died in his minority, intestate, and without issue: *Ruled*, that the plantation should not go to the heirs of *Mathias* at common law, but be divided among his brothers and sisters, under the supplemental intestate law. 20 175

Where the heir at law takes an intestate's lands at a valuation, the Orphan's Court ought instead of Bonds, which are a mere personal security, to take his recognizance, by which the lands themselves would be bound for the payment of the distributive shares. 265

The eldest son, of the eldest son of an intestate, is entitled to an estate which cannot be divided, at the valuation, in the same manner as his father. 353

And the adjudication is not to be to all the children of the eldest son, but to his eldest son, who is alone his heir at common law. *ibid.*

In partition of an intestate's estate, the decree of the Orphans Court was reversed, because no provision was made for a Tenant by the courtesy of his wife's share. *ibid.*

Where the purparts of the valuation money, at which the heir at law takes an intestate's real estate, are not specified, nor the time of payment fixed, the sentence of the Orphans Court is not sufficiently certain. 354

But, on appeal, the Supreme Court might reduce both those points to certainty; and, in that case, the whole costs of the appeal would fall on the Defendant. *ibid.*

Where an heir at law offers to take an intestate's real estate at a valuation, the fee in the premises is not vested in him, if he has neither paid, nor secured the payment of, the valuation money to those who are entitled to receive it *ibid.*

Upon the death of a man, intestate, his lands are bound for the payment of his debts in such a manner, that they may be taken in execution and sold, notwithstanding the heir may have previously sold and conveyed the same, to *bona fide* purchasers. 481

And in such case, the purchaser from one heir is bound to contribute in aid of the other heirs, whose lands remain unsold 484

But *quære*, whether Purchasers under an order of the *Orphans Court*, are likewise bound to contribute? 486

JUDGES.

See *Judgment.*

JUDGMENT.

MOTION in arrest of judgment:—1st. That in an indictment of forcible entry, &c. it was stated, that "the Prosecutor was *seized* in his demesne as of fee," without saying *when*; 2d. That he was *seized* in his demesne as of fee, and that "his peaceable *possession* thereof as aforesaid continued until, &c." which was repugnant: But both objections were over-ruled. 68

Judges are not bound to assign any reasons for their judgment, and when they do, it is always in public. 89

Judgment confessed by warrant of attorney executed by one Partner, in the name of both, set aside as to the Partner who did not sign the warrant, and confirmed as to the Partner that did. 149

A judgment obtained in a foreign attachment in a sister state is not conclusive evidence of the debt, in an action between the same parties here. 261

Where Judgment may, or may not, be entered in the Supreme Court by warrant of attorney. 291

Judgment was arrested in an action brought by the purchaser of a Promissory note in his own name, against the drawer, on the mere sale and delivery by the payee, without any indorsement or assignment, or any other consideration for an *assumpsit* being laid in the declaration. 370

After Judgment *by default*, the Defendant may give evidence to the Jury on executing a writ of Inquiry; but not after Judgment in a Foreign Attachment 377

A Judgment has relation to the first day of the Term, so as to exclude a Domestic Attachment in favour of the judgment creditor. 450

If the verdict is good, a judgment entered upon it, generally, must be so, likewise; for, when it is drawn at large, it may be put into form. 462

See *Bail. Bankruptcy. Error. Infant. Supreme Court. Justices. Warrant of Attorney.*

JUDGMENT CREDITOR.

See *Bankruptcy. Judgment.*

JUSTICES.

A Prisoner in execution on a Justice's Warrant for a sum exceeding 10*l.* was discharged on *Habeas Corpus* 135

After appeal, and security given, a Justice cannot issue an execution against the Defendant, but must proceed against the Bail upon the Recognizance 316

The judgment of a Justice was reversed, 1st. Because the *summons* was returnable on the next day, whereas the act requires that there should be allowed a time not less than five, nor exceeding eight days; and 2dly, because the summons was to answer a debt under forty shillings, and the Judgment was for a greater sum. 405

The Defendant, after Judgment is given against him by a Justice, ought to enter into a recognizance *instanter* with, at least, one good surety: He may afterwards withdraw his security, or appeal within six days. 406

JUSTIFICATION.

See *Nuisance.*

LAW OF NATIONS.

THE law of nations is a part of the municipal law of *Pennsylvania*. 114

To insult a Secretary to the Legation in the house of the Minister Plenipotentiary, is a violation of the law of nations punishable by fine and imprisonment. *ibid.*

But a person convicted of that offence, although claimed as a subject of a foreign power, cannot be given up on such claim; but cases may occur, where, *pro bono publico*, offenders may be delivered up to the justice of the country from which they endeavour to escape. 116

Nor can the person so convicted, be imprisoned till the sovereign, whose officer was insulted, shall declare that the reparation is satisfactory; for punishments must be certain and definite in all respects. *ibid.*

The person, house, and *comites*, of a Minister, are all protected by the law of nations. *ibid.*

See *Alien. United States.*

LEGACY.

See *Administrator.*

LETTER OF ATTORNEY.

Where a special letter of attorney was given to institute a suit, and afterwards a person having a general power, executed a release to the Defendant in the suit, the Court held the authority to be sufficient, and discharged the party. 449

LIMITATIONS.

The Stat. of Limitations, 32 H. 8. c. 2, extends to *Pennsylvania*. 15. 67

So does the 21 *Jac.* 1. *c.* 16. 19

But the 32 *H.* 8. *c.* 9. does not extend. 67

For the Stat. of Limitations to bar in Ejectment, the possession must be adverse. *ibid.*

The Court will never open a regular judgment, to let in a plea of the Statute of Limitations 239

It is only necessary to enter the continuances, in order to prevent the bar of the Statute of Limitations, where

the writ and Declaration disagree as to the nature of the action. 411

LIS PENDENS.

Before the return of the writ, the Plaintiff moved for a Special Court; but it was held, that the action was not depending for that purpose till the writ was returned. 77

See *Practice.*

MARINERS.

See *Master and Servant.*

MASTER AND SERVANT.

UPON a general retainer, for no particular voyage, the Owners of a vessel may dismiss the Captain at any time, without cause assigned; but where there is a Charter Party, Bills of Lading, and a particular voyage agreed upon, though the owners may dismiss the Captain, yet they would be liable in a Court of Common Law. 49

As *villeinage* never existed in *America*, no part of the doctrine founded upon that condition, is applicable here. 167

Property in a negro may be obtained by a *bona fide* purchase without deed 169

The Captain is liable for the wages of mariners, if he admit them to serve on board the vessel, although they were originally shipped by the owner. 393

A negro born before the 1st of *March* 1780, *to wit*, in 1779, and not recorded agreeably to the act for the gradual abolition of slavery, cannot, under that act, be held as a servant till she is 28 years of age, but is absolutely free. 469

See *Admiralty. Customs.*

MEDIETAS LINGUÆ.

See *Trial.*

MESNE PROFITS.

See *Ejectment.*

MORTGAGE.

A subsequent simple contract debt cannot be recovered on a *Scire Facias* upon a prior mortgage; but only the principal, interests and costs; on payment of which the Court will stay the proceedings on the *Sci. Fa.* 142

A mortgage, though not recorded within six months, is good against the mortgagor; the Deed, so far, is sufficient to pass the lands; and, under it, he possession of the Premises might have been recovered in Ejectment. 434

A mortgage, acknowledged and recorded the day after the Declaration of Independence, by officers appointed under the proprietary government, was, nevertheless, held to be valid against a subsequent judgment creditor, and *bona fide* purchaser, for a valuable consideration. 435

See *Evidence. Deed. Payment.*

NEGROES.

See *Master and Servant.*

NEW TRIAL.

See *Trial.*

NONJUROR.

See *Devise.*

NOTICE.

See *Bills of Exchange.*

NUISANCE.

IT is no justification on an Indictment for a Nuisance by intruding on the public property, that it is beneficial to the public. 150

ORPHANS COURT.

THE Orphans Court have a power to assign the guardianship of Minors, under 14 years of age, to whom they please, and are not confined to the guardian in soccage, or by nurture. 136

Where an heir at law takes an Intestate's lands at a valuation, the Orphans Court ought, instead of Bonds, which are a mere personal security, to take recognizances, by which the lands themselves would be bound for payment of the distributive shares. 265

See *Intestate. Partition.*

PAROL TESTIMONY.

See *Evidence.*

PARTITION.

IT would be well for the party praying for a partition of an intestate's real estate, to be particular in the names of the persons entitled to shares, and

of the purparty of each; but the Court would not reverse an inquest for omitting this. 35

The decree of the *Orphan's Court* was reversed, because in partition of an intestate's estate, no provision was made for a Tenant by the courtesy of his wife's share. 353

The practice in the *Orphans Court* has been to direct the same Inquest which is appointed to make a partition of real estate, if that cannot be done without prejudicing the whole, then to make the valuation. 354

Where a recovery in partition is no bar to an action of Dower, in that moiety of the premises, which is assigned to the Tenant 418

See *Dower. Intestate. Orphans Court.*

PARTNERSHIP.

One Partner cannot bind another by executing a Deed under the joint firm. 119

Not only the Ship's Husband, but all the real owners at the time of the work done, are liable to the Tradesmen. 129

Payment to an Executor, or Administrator of a deceased Partner, can be no satisfaction to the survivor, who has the sole right of suing for, and of receiving the monies due to the company. 250

Articles of Copartnership, being *res inter alios acta*, the limitations cannot be known, and, therefore, ought not to affect a third person, who acts under a legal authority from one of the Partners. 269

One of two Partners may give an authority to a clerk under the firm of the House; and the clerk may, in consequence thereof, accept bills, and sign, or indorse, notes, in the name of the company. *ibid.*

See *Action. Bankruptcy. Judgment.*

PARTY WALL.

The reimbursement of the cost of the moiety of a party wall, is only a personal charge against the builder of the second house, and not a lien upon the house itself. 345

PAUPER.

It is not necessary that an examination should appear upon an order of Sessions for the removal of a Pauper. 28

If a Pauper was injured by removal, a remedy may be had by Information. *ibid.*

PAYMENT.

Under the plea of Payment, mistake, or want of consideration, may be given in evidence. 17 260

A Bond given in payment of a precedent debt, is conclusive evidence of the Contract to prevent the Obligor's claim of paying by Instalments under the act of Assembly. 83

Partial payments, a rule for crediting them. 124. 378

Payment to an Executor, or Administrator, of a deceased partner, is no satisfaction to the survivor, who has the sole right of suing for, and receiving the monies due to the company. 250

In an action of debt upon a Bond, and where the issue is joined on a plea of payment, the Jury may, and ought to presume every thing to have been paid, which, *ex equo et bono*, ought not to be paid. 260

Money paid into the hands of the Prothonotary upon a judgment, is to be considered in the same state as if paid to the Sheriff; and is not liable to be attached by the person who paid it on a suggestion that the debt may have been otherwise satisfied. 254

Where a Bond shall not be considered as payment, or extinguishment, *pro tanto*, of money due upon a mortgage. 423

See *Practice. Current Money. Administrator. Evidence.*

POLICY.

See *Insurance. Evidence.*

PRACTICE.

When the Defendant has shewn title in a third person, he may take the opinion of the Court on that title, by motion for a *nonsuit*, before he has gone through all his evidence. 18

In such case the Plaintiff cannot demur to the Defendant's evidence, till he has gone through the whole *ibid.*

When a Deed is produced in evidence,

it must be shewn *in hæc verba*, upon demurrer. 20

Whenever a writ issues fairly, if delivered first, it shall take preference. 22

The proceedings on a *Hab. Corp.* are *de novo*; but on a *Certiorari* the Court proceed on the state returned. *ibid.*

Fi. fa. issued on a Judgment in the Bail Bond suit; proceedings were stayed on affidavit of a defence, pleading issuably in the original action, and consenting that the Judgment on the Bail Bond should remain as a security. 130

To entitle the Plaintiff to judgment by default, the service of a summons, *on the person* of the Defendant, as well as if left at his house, must be ten days before the return. 154

On affidavit that material witnesses for the Defendant (who was in confinement) were about to leave the State, the Court granted a rule to take their Depositions, though the writ was not returnable till next term. 164. 251

An Attorney's agreement to refer binds his client. 164

The Defendant, by mistake of his attorney, had notice of trial for the 17th instead of the 13th, and not appearing on the 13th, judgment was entered by *non sum informatus*; but afterwards, on proof of the mistake, the judgment was opened 241

Although the words that "the Defendant has not been *resident* in the state for twelve months before the writ issued," are inserted in an affidavit to found a *Capias* against a Freeholder, yet the Court will enquire into the circumstances of the case, and relieve him from arrest, if they think he was *intended* by the act to be exempted. 245

A third person fully acquainted with the circumstances, is admissible to make the affidavit of a defence, when the party himself, from extreme sickness, is incapable of making it. 248

Auditors shall be appointed only where there is a dispute about the depreciation. *ibid.*

The Plaintiff, after stating the want of a material witness, who had been *subpœna'd*, put off the trial; but the Court, notwithstanding, granted the Defendant a rule for trial next term or *Non Pros.*

It is an invariable rule not to appoint referees, but in the presence of both parties. 251

The Court will grant a rule to take the Depositions of going witnesses, *de bene esse*, before the return of the writ. *ibid.*

A case in *Term Reports*, being a determination upon general mercantile law, is of authority here 272

After Judgment has been regularly entered in a *Foreign Attachment*, it is too late to move to quash it. 294

On an appeal from the determination of the Regulators of Party Walls, &c. a feigned issue can only decide, whether the Regulators have done right or not; it cannot decide the title and finally settle the matter; and, therefore, it is proper to try the question by *Ejectment*. 303

The privilege of a Freeholder to be sued by summons, extends to actions of Trespass *vi et armis*. 310

The rule is, that unless exceptions to the Report of Referees are filed within four days, the judgment *nisi* becomes absolute. 312

A *Distringas* will lye against a Sheriff *while in office*, upon a return of levied to the value, &c. but, under particular circumstances, it would be hard to issue it, without moving the Court. *ibid.*

The *Venire* was laid in *Philadelphia* county, and judgment being there obtained, execution was immediately issued into *Bucks*; but upon motion the writ was quashed, the Court being of opinion, that the Plaintiff ought to have proceeded by *Testatum*. 330

On a rule for trial or *non pros*, the *non pros* must be moved for in Court; it cannot be signed in the Prothonotary's office. 347

A *Capias* will not lye against a Freeholder, although the attorney directs his appearance to be accepted. 348

Rule to referand report to *next term*; after the next term, the Referees were changed by consent, and report returnable *into office*: Determined that the rule to report to *next term* was expired by its own limitation. 349

On motion, and positive affidavit of the debt at the first term, a shallop attached under a *Foreign Attachment*, was ordered to be sold as a perishable commodity. 379

It has been the practice for the Sheriff to hold an Inquest, as well after as before the return of a *Fi. fa.* 379

Rule for trial, or *non pros*; but afterwards a plea added, and particular facts referred: It was ruled, that, by this, the rule for trial or *non pros* was virtually vacated. 405

On a libel for a divorce, notice ought to be given that between two specific dates, acts of cruelty, &c. were intended to be proved 409

Rule for trial or *non pros* in *September* Term, and notice at bar; and the cause continued generally till *January* Term: It was determined that the rule for trial, or *non pros* was continued; and that no new notice was necessary. 410

Upon affirmance of a judgment in a cause removed by *Certiorari* from before a Justice of the Peace, execution may issue at once out of the Supreme Court. *ibid.*

It is only from the disagreement of the writ with the Declaration, that it becomes necessary to enter the continuances, to shew it issued for the same cause of action, in order to prevent the bar of the Statute of Limitations 411 450

The writs of *Capias* and *Summons* in *Pennsylvania* always specify the nature of the actions to be declared in, and are, therefore, similar in respect of entering continuances, to the *Originals* out of Chancery, and the *Attachments of Privilege* in the Common Pleas. 411

What is a reasonable time to renew an action; or to prosecute it upon the foundation of the old writ, where there has been no actual abatement. 412

Judgment before a Justice of Peace is sufficient to defeat a Freeholder's privilege of being sued by summons. 436

The practice of entering verdicts on the issue of *non solvit.* 462

See *Action. Assignment. Contempt. Treason. Discontinuance. Error. Privilege. Foreign Attachment. Justices. Judgment. Partition. Lis Pendens, &c.*

PRIORITY.

When the Commonwealth is not entitled to a priority. 150

See *Domestic Attachment.—Bankruptcy. Judgment.*

PRIVILEGE.

Through the affidavit to ground a *capias* against a freeholder contains the words, that "he has not been *resident*, &c" the Court are not precluded, and will enquire into the circumstances of the case, in order to ascertain, whether the non-residence comes within the meaning of the act of Assembly. 346

A Lieutenant of another county who comes to Philadelphia, to take out the commissions of some militia officers, is not privileged from arrests while here. 295

A sheriff elect who comes from another county to solicit Council for his appointment, is not privileged from arrests while here. *ibid.*

A member of Assembly, or of a State Convention, is privileged from being arrested, or served with a summons, during the sitting of the Assembly or Convention. 302

A Consul, residing abroad, and having entered into partnership with another person, is not privileged from being sued *in not.* 305

A freeholder who quits the State for a particular purpose *animus revertendi*, leaving his family behind him, does not lose his privilege of being sued by summons 348

A person attending Court is not privileged from being arrested upon a *Ca. Sa.* 356

Judgment before a Justice of Peace, is sufficient to defeat a freeholder's privilege of being sued by summons. 438

See *Practice.*

PROMISSORY NOTE.

A writing under seal cannot be given in evidence in an action of *assumpsit* on a promissory note. 208

Where there are subscribing witnesses to a promissory note, they must be produced, or some account given of them at the trial. 209

Sale and delivery of a promissory note, by the payee, without any indorsement or assignment is not, of itself, a legal ground of *assumpsit*, to enable the purchaser in his own name, to sue the drawer. 441

The Indorsee of a Promissory note, takes its subject to all equitable considerations, to which the same was subject, in the hands of the Indorsor, the original Payee. 441

See *Bill of Exchange.*

PROPERTY.

What acts, between the Chapman and a Shopkeeper, do not amount to a change, or transfer, of the property. 170

See *Foreign Attachment. United States.*

PROSECUTOR.

The Act of Assembly does not intend that a Prosecutor should be indorsed on all Indictments; but only where a Prosecutor really exists. 5

The Defendant is not a competent witness to prove the person prosecuting, it must be proved by indifferent witnesses. 6

The Judge who tries the cause, not being authorised by the Act of Assembly, to certify, so as to exempt the Informer from costs, he cannot do it. 63

PROTEST.

See *Bill of Exchange.*

PURCHASE.

The word *Purchase*, implies a Purchase in Fee. 20

REAL ESTATE.

See *Intestate.*

RECITAL.

See *Deed.*

RECOGNIZANCE.

See *Bail. Orphans Court.*

RECORDS.

See *Mortgage.*

REFERENCE.

NOTICE of the time and place of the meeting of Referees, must be served on the party, not his attorney, unless the rule so expresses it. 81

Report of Referees set aside, for ordering the parties to withdraw, and examining the witnesses in their absence.

Report that "*£. 75 was due the 3d of March last*, &c." set aside for incertainty. 119

Where the exceptions to a Report of Referees arise from the face of the report, and depend on a construction of law, they need not be filed in writing. 129

Five several actions being referred, and only one report, the report was confirmed, contrary to the opinion of SHIPPEN, President. 145

Quære, Whether Referees have authority to consolidate actions submitted to their decision? 145. *See* 355

What kind of evidence may be admitted before Referees. 161

The admission of an interested witness, will not be sufficient to set aside the Report of Referees. *ibid.*

An attorney's agreement to refer, binds his client. 164

The Courts have of late considered awards with great latitude, according to the intention of the arbitrators, appearing from the words of the whole. 174

Two of the essentials in awards, are, that they should be certain and final. *ibid.*

An award to pay to the *Executors* of J. G. deceased, is sufficiently certain; and it may be averred who they are by name. *ibid.*

Report set aside for allowing *ex parte* evidence to be given of the current price of coachmakers work, at the time the action was brought. 187

It is not sufficient to invalidate a report, that the Referees sent for the plaintiff alone and asked him whether he would agree that a quarter's rent, which accrued after the action brought, should be credited to the defendant. 188

It is an invariable rule not to appoint Referees, but in the presence of both parties. 251

Report of Referees set aside for the error of the clerk in making out the rule or agreement to refer. 293

The different kinds of awards in *Pennsylvania*. 314

If the Court would grant a new trial had the exceptions been made to a verdict, they ought for the same reasons to set aside a report. *ibid.*

Report of Referees set aside, 1st. Because the Referees gave interest upon an unliquidated account: and 2dly, Because they allowed a charge of premium and commission for making insurance, without requiring the policy to be produced, or any proof of its being lost. *ibid.*

The Court have always confined themselves to two points on motions to

set aside reports of Referees: 1st, Whether there is an evident mistake in matter of *fact*; 2dly, Whether the Referees have clearly erred in matter of law. 314

The Court refused the application of Referees for instructions on a point of law. 347

Two actions between the same parties on different promissory notes being referred, the Referees made one report for one sum; but afterwards, filed a supplementary report distinguishing what was due in each action: and, it was held, that the first report could not be maintained; and that the second was irregular 355

A rule of Reference to report to *next term*, does not authorise issuing executions upon a report *into office* during the vacation, although a term had intervened between the entry of the rule and the appointment of the Referees *ibid.*

Where a report of Referees awards money to be paid on one side, and certain other things to be done on the other, if the Court cannot enforce both, they will certainly enforce neither. 364

But though the Court may not be able to do this by *execution*, yet, if they can do it by *Attachment*, the remedies are mutual, though not by the same kind of process. *ibid*

An *Attachment* would lye for a contempt in not performing an award of Referees at common law, before the stat. of 9 & 10 *W.* 3. *ibid.*

In all cases, where matters are awarded to be done on both sides, the Court will exercise their equitable powers in such a manner, as not to suffer either party to elude the performance of his part of the award. *ibid*

If any part of an award be impossible to be performed, the Court will refuse an *Attachment* for that part. 365

It is too late to annul the rule for Reference, when the Referees have investigated the whole transaction, agreed upon their report, and were clear from any imputation of misconduct. 430

Report of Referees set aside, because they declined to consider the most material ground of the controversy upon a mistaken principle, leading to real injustice to one of the parties 486

REGULATORS.

See *Ejectment. Party-Wall.*

RENT.

See *Ground Rent.*

ROADS.

The review of a road, though not taken notice of in the Act of Assembly, has always been granted, and is now become a matter of right. 11

REPLEVIN.

There are no replevins in *Pennsylvania*, either under the statute of *Marlbridge*, or at *Common Law*; but only under the Act of Assembly. 156

The Act of Assembly does not recognize two kinds of Replevin, one by plaint, and the other by writ. *ibid.*

Replevins are made always returnable writs by the Act of Assembly, and the parties appearance required on the return *ibid.*

The act directs Replevins to be determined in the Common Pleas *ibid.*

Replevin lies in *Pennsylvania* wherever a man claims goods in the possession of another. *ibid.*

Judicial writs *de proprietate probanda* cannot be issued in *Pennsylvania*. *ibid.*

The Sheriff, in an action of trespass brought against him, cannot justify under a writ of Replevin, if he refused the defendant in Replevin a reasonable time to find security, on a claim of property, before the goods in question were removed 225

As the law gives the remedy of a distress to a landlord, it is incumbent upon the Sheriff to see that the security is good, before he returns the property on a Replevin 341

The value of the distress at the time of the Replevin, and not the amount of the rent due, is the proper measure of damages. *ibid.*

Goods distrained ought to be valued before they are delivered on replevin. *ibid.*

The Sheriff is responsible for the sufficiency of the sureties in a Replevin bond, at the end of the suit, when the landlord has established his right to the rent, for which the distress was taken. 349

No evidence ought to be admitted to contradict the Sheriff's return of *Elon-*

gatur, after judgment *de retorno habendo* in Replevin. 439

The goods of a stranger, being removed before the distress cannot be pursued within the thirty days. 440

See *Costs. Sheriff.*

RESIDENT.

See *Privilege.*

RETURN.

See *Replevin.*

REVOLUTION.

See *Government.*

SALE AND DELIVERY.

See *Promissory Note.*

SHERIFF.

IN an action of trespass brought against a Sheriff, he cannot justify under a Writ of Replevin, if he has refused the defendant in Replevin a reasonable time to find security on a claim of property before he removed the goods in question 22

A *Distringas* will lie against a Sheriff while in office, upon a return of levied to the value, &c 312

The Sheriff, under a *Vend. Exp* must sell not merely to the *highest*, but to the *best* bidder. 419

SLAVERY.

See *Master & Servant.*

SPECIAL COURT.

A Foreigner is not entitled to a special court, upon a debt assigned to him by a citizen. 167

The act for allowing special Courts to plaintiffs, seems intended for the benefit of every man, who is about to leave the State. 267

See *Lis Pendens.*

SUBJECT.

See *Government.*

SUMMONS.

See *Practice. Privilege.*

SUBPOENA.

See *Costs. Witness.*

SUPREME COURT.

A judgment cannot be entered in the *Supreme Court*, even in the county of *Philadelphia*, by warrant of Attorney, upon a bond *of a date prior* to the Act of Assembly 291

As by that act, the original jurisdiction of the Court is restricted to the county of *Philadelphia*, a judgment cannot, at any subsequent period, be entered as of *Bucks* county. *ibid.*

This Court has authority upon appeal, to alter and confirm any proceedings that come properly before the *Comptroller General*, but if he had no jurisdiction, the Court can have none. 362

As the Comptroller General, therefore, has no right to adjudge a compensation from the state *for damages*, which individuals have suffered in the course of our military operations, the Court can grant no relief upon appeal, although the applicant might be entitled to it in equity. *ibid.*

See *Comptroller General.*

TENDER.

THE Act of Assembly of the 29th of *January* 1777 declares, that a tender shall amount to an actual payment and discharge; whereas a tender at common law, only suspends the interest till a subsequent demand and refusal. 406. 7. 8

Therefore, a tender in Continental money, emitted by Congress *before the 29th of January*, 1777, is tantamount to payment 407. 8

But a tender in Bills of Credit emitted *subsequent to the 29th of January*, 1777, has only the effect of a tender at common law. *ibid.*

See *Payment.*

TITLE.

See *Evidence. Ejectment.*

TREASON.

A person accused of high treason, shall have a copy of the indictment, a reasonable time, not less than one day, before the trial: and also within the same time a copy of the pannel of the jurors. 33

Adherence to *American* troops, tho' in consequence of mistaking them for the enemy, cannot be treason. *ibid.*

Words indicating the defendant's intention to join the enemy, are proper testimony, to explain the motives upon

which the intent was afterwards carried into effect. 33

Evidence may be given of an *overt-act* committed in another county, after an *overt-act* is proved to have been committed in the county where the indictment is laid. *ibid.*

Evidence that the defendant had a power to let people in and out of the city, when in possession of the enemy, ought to be received; but not as conclusive proof of his *holding a commission* under them. 35

But evidence of his seizing salt, or disarming the *Americans*, does not apply to that species of treason; though it may prove his having joined the armies of the enemy. *ibid*

It is enough to lay in the indictment, that the defendant sent intelligence, without setting forth the particular letter or its contents *ibid.*

The charge of levying war, is not, of itself, sufficient; but assembling, joining, and arraying, with the forces of the enemy, is a sufficient *overt-act* of levying war. *ibid.*

There must be an actual enlistment of the person *persuaded*, in order to make it treason in the persuader. 39

If an *overt-act* has been proved where the indictment is laid, the defendant's confession may be given in evidence to corroborate that proof. *ibid.*

Treason is a crime known at the common law 53

Treason which is nothing more than a criminal attempt to destroy the government, may be committed before the different qualities of the crime are defined, and its punishment declared by positive law. 57

See *Treaty of Peace.*

TREATY OF PEACE.

After the peace, the Court would not sustain a suggestion filed by the Attorney General, against one who was attainted in pursuance of a proclamation issued during the war; as a proceeding of that kind would contravene an express article in the treaty with *Great Britain.* 233

TRIAL.

The trial of a misdemeanor put off on affidavit of the absence of a material witness; but declared not to be a precedent. 9

The Court would not force the Crown to a trial, or discharge the defendant from bail, without some appearance of oppression. 9

The stat 28 *Edw.* 3. c. 13. granting trials *per medietatem linguæ* to foreigners, is in force in *Pennsylvania.* 73

The affidavit of one who was landlord to the defendant in ejectment, admitted on motion to put off the trial of the cause. 81

On affidavit of the absence of a material witness, the court put off the trial, refusing to enquire what his testimony would be. 135

The affidavit of a person eventually interested in the suit, proving the want of a material witness, is sufficient to put off the trial. *ibid.*

Granting new trials depends on the legal discretion of the court, guided by the nature and circumstances of the particular case. 234

See *Infant. Error. Practice.*

UNDERWRITERS.

See *Insurance.*

UNITED STATES.

FROM the moment of the association of the *United States*, they necessarily became a body corporate; for, there was no superior from whom that character could otherwise have been derived. 41

It was agreed in Congress when the *British* army evacuated *Philadelphia*, that all the public property of the enemy, such as cannon, &c. should belong to the *United States;* and the private property of individuals to *Pennsylvania.* 71

Congress during the late war, might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this is a natural and necessary incident. 362

See *Law of Nations. Government. Treaty of Peace. Judgment.*

USURY.

Where a partial payment is made and received on account of a note given for the payment of money borrowed at usurious interest, the usury is complete. 216

Proof of a note given by one of two partners, for the payment of money borrowed on usurious interest, and afterwards paid, will not support a count, stating the usurious contract to have been with the partners jointly. 216

Although no money is actually paid, the usury is complete, when new notes are taken in satisfaction of old ones given for the payment of money borrowed at a usurious interest. *ibid*

A fair purchase may be made of a bond or note, even at 20 or 30 *per cent* discount, without incurring the danger of usury. 217

VERDICT.

STRICT form in a verdict is not necessary; it need only to be understood what the intention of the jury was, agreeably to which, it may afterwards be moulded into form. 462

WARRANT OF ATTORNEY.

A WARRANT of attorney to confess judgment on a bond, is subservient to the bond, and execution cannot be issued, till the time given for payment in the condition, has elapsed 133

Quære, Whether a warrant of attorney to confess judgment in the court of *Common Pleas*, will authorise its being confessed in the *Supreme Court*. 288

See *Judgment. Supreme Court.*

WILL.

It is not necessary that a will devising real estate should be sealed. 94

Nor that all the subscribing witnesses should prove the execution. *ibid.*

Nor that the proof of the will should be made by those who subscribed as witnesses. *ibid.*

Nor that the will should be subscribed by the witnesses. *ibid.*

Two witnesses are necessary to the proof of every testamentary writing, whether for the disposition of real or personal estate. 286

See *Administrator. Devise.*

WITNESS.

The defendant is not a competent witness to prove the person prosecuting; it must be done by indifferent witnesses. 6

In an action on a Policy of Insurance, the Captain of the ship, having goods on board, and insured by other underwriters, who refused to pay till the determination of this suit, was examined on his *voir dire*, and, swearing himself disinterested, he was sworn in chief. 7

The plaintiff's brother was offered to prove his age, from the hearsay of his father and mother; but the Court would not allow him to be sworn. 9

If a man thinks himself interested, though, in fact, he is not, this is sufficient to exclude his testimony. 62

An informer, on the seizure of contraband goods, cannot be a witness, although he releases his right to the moiety. 63

Where a party calls a witness, who is contradicted by another witness of his own, he cannot call the first to disprove what the second has said. 63

Quære, Whether a confidential clerk or agent comes within the rule respecting council and attornies not being permitted to disclose the secrets of their clients. 66 439

Wife of the prosecutor in an indictment of *forcible entry* may be a witness to prove the *force*; but only the force. 68

On an indictment for forgery, the party whose name is forged, is a good witness. 110

That referees have heard an interested witness, is not a sufficient cause to set aside their report. 161

The subscribing witnesses to a promissory note must be produced, or some account given of them at the trial. 209

In an action brought by the indorsee of a bill of exchange against the first indorser, the plaintiff's immediate preceding indorser cannot be made a witness by striking his name off the *first* and *third* bills of the set, although it is suggested that the *second* bill was lost. 272

There are two ways of proving a witness to be interested; 1st. by examining him on his *voir dire*; and, 2d. by evidence; but both cannot be pursued at the same time. 275

A cross examination under a rule

for taking depositions will not amount to an examination of the witness on his *voir dire*; nor preclude any exception to his competency at the trial 275

Under what circumstances a witness once interested, may cease to be so. 272 276

In what cases it is, or is not, necessary to take out a *Subpoena* for a witness. 276

See *Agent. Will. Evidence.*

WORDS.

The word *purchase*, implies a purchase in fee. 20

The word *persuading* used in the act with respect to treason, means to *succeed*. 30

Though in actions of slander words were formerly construed in the mildest sense that they would admit, they are now to be taken according to their ordinary import and meaning. 114

See *Assignment.*

WRIT OF ENQUIRY.

The court will not set aside the verdicts of juries of inquiry upon frivolous grounds, nor examine the effect of any particular piece of evidence on the mind of the jury; for unless it appears, that there was *no* proper evidence, the court will presume that they had sufficient grounds for their inquest. 82

After judgment *by default* the defendant has a right to offer his evidence to the jury of inquiry to combat the plaintiff's proofs; and if the sheriff refuses to hear the evidence on both sides, the court will direct a new writ of enquiry. 377

But after judgment in a *foreign attachment*, the defendant in the *attachment* is not entitled to produce evidence before the jury of enquiry. *ibid.*

There is nothing in the act of assembly which precludes the sheriff from holding an inquest after the return of the *Fi fa*. 379

An inquisition quashed for irregularity becomes a nullity, and leaves the case just as if none had been taken. *ibid.*

Additional Appendix.

Proceedings of the Supreme Executive Council of Pennsylvania, in the case of the Commonwealth v. *Doane, subsequent to the opinion of the Judges, inserted in page* 86.

IN COUNCIL.—*January*, 1785.

COUNCIL taking into most serious consideration the transcript of the record, transmitted to them by the honourable the Judges of the Supreme Court, of the conviction and attainder of *Aaron Doan* by outlawry, the *Capias* directed to the Sheriff of *Bucks* county to take the said *Aaron Doan*, &c. the return thereof, the letter of Council to the said Judges, and their answer, and the consequences to citizens of this Commonwealth, of establishing a precedent, in a capital case, altogether new, thereupon

RESOLVED,* That it does not appear, that a warrant can be legally issued for putting the said *Aaron Doan* to death, upon the outlawry aforesaid, for the following reasons:

First—The outlawry of the said *Aaron Doan* being founded on the "Act for the advancement of justice, and more certain administration thereof," passed *May* 31st, 1718, the said act ought to have been strictly observed, and its directions pursued with an "*exceedingly nice and circumstantial*," (*a*) *exactness*, especially, as the penalty would be so ruinous, and the precedent may be so dangerous.

* Council having determined not to issue a warrant for execution, did not formally pass these resolutions; which were submitted to them by their learned and humane President.

(*a*) 4 *Blackstone* 320. "It seems generally agreed, that IN FAVOUR OF LIFE, an outlawry of *treason* or *felony*, might be avoided by plea, that the Defendant was in prison, or in the king's service beyond sea, &c. at the time of the outlawry pronounced against him. But I take it to be generally agreed, that no outlawry for *any other crime* (against a party rightly described) can be avoided by the plea of any matter of fact whatever." 2 *Hawkins*'s P. C. 460.

"By *Magna Charta*, no man can be outlawed but according to *the law of the land*." 1 *Blackstone* 142.

But, the proceedings aforesaid vary from the said act in these instances:

1st.—It is not returned by the Sheriff, that the party was called on by proclamation "to answer *to the Commonwealth*," as according to the said act and the *Capias* ought to have been done.

2d, It does not appear (unless by *implication* or *intendment*, in this case inadmissible) that the *Capias* was "delivered to the Sheriff *three* months before the return thereof," as the said act requires; it not being even returned, that the proclamations were made *by virtue of the Capias*.

3d.—The said act and the *Capias* "order the Sheriff to *make* proclamation," &c. but, the Sheriff returns, that he *caused* public proclamation to be made, &c. He does not say, that he was *present* when the proclamations were made: yet, in many cases of a much inferior nature a Sheriff's presence is indispensably necessary (*b*).

4th.—The act directs the making "proclamations *in* every Court of quarter sessions, &c." but, the Sheriff returns, that it was "made *at* two several Courts of quarter sessions, &c."

5th.—The act says, that proclamation shall be made for the party to "appear *before the said Justices*, at the said Supreme Court;" but, the Sheriff returns, that the party was called upon by proclamation "to appear *at the Supreme Court*."

Second—The sheriff returns on the *Capias*, that the party was called upon "to appear *at the day and time within specified*," which might be done by *reference only* in the proclamation to the writ, *without expressly mentioning* the day and year when the party ought to appear.

The return ought *expressly to mention* the day and year; and *no intendment however strong* is sufficient to supply the defect. (*c*) Where life depends *on proclamations*, there cannot be too much exactness required, in order that the party may have *due notice*.

(*b*) 4 *Bacon*'s Abr. 441.

(*c*) 2 *Hale*'s P. C. 203 *4to.* 94. 3 *Bac.* 767. 772. 4 *Burr.* 2559. The return says, "I have caused public proclamation to be made, *in manner and form as within I am commanded.*"—"This is certainly too loose: the proclamations are not sufficiently set out, for the Court to judge, *whether they were properly made or not.* I thought this error *fatal.*" Lord *Mansfield*, in *Wilkes*'s case: And the error would have been "*fatal,*" if proclamations had been necessary in that case: but from peculiar circumstances they were not necessary. In *Aaron Doan*'s case, they are acknowledged to have been necessary. They are the most essential parts of the whole proceedings. Indeed, by the act of Assembly on which this outlawry is founded, the *exigi facias* and *the writ of proclamation* are *combined.* The *distinct* nature of them is stated in 3 *Blackstone*, 283, 284, &c. and in the Appendix, 16, 17, &c.

"I beg to be understood, that I ground my opinion SINGLY *upon the authority of the cases adjudged;* which as they are on the *favourable* side, in a *criminal* case *highly penal*, I think *ought not to be deserted from:* And therefore I am bound to say, that *for want of these technical words*, the outlawry ought to be *reversed.*" Lord *Mansfield*, in *Wilkes*'s case.

The other three Judges spoke *seriatim;* and concurred with the chief Justice.

A multo fortiori, the POSITIVE terms of a LAW, in a case VASTLY MORE PENAL, "OUGHT NOT TO BE DEPARTED FROM."

Third—The Sheriff returns, that he "caused public proclamation to be made at two several Courts of general quarter sessions of the peace held at *Newtown* for the county of *Bucks*, &c."

But, it was solemnly determined, on repeated argument, and the most serious consideration by all the Judges in *Wilkes*'s case, to which the honourable Judges of the Supreme Court refer—that, from the *precedents* it appears, that a series of Judgments have required *a technical form of words*, in the description of the *county Court*, at which an outlaw is exacted: that after the words "*at my county Court*" should be added the NAMES *of the county*; (*d*) and after the word "held," should be added—"*for the county* of ———" (naming it again)——

In the return in the present case, the name of the county is not mentioned *before* the word "*held*."

Upon the authority of these *precedents*, the outlawry in *Wilkes*'s case was reversed; and *they*, together with the remarkable Judgment in his case, demonstrate the present outlawry to be erroneous: for certainly, it cannot be easier to take away the LIFE of a citizen by an outlawry in this state, than to inflict a slighter punishment by outlawry on a subject in *England* (*e*).

If *bare precedents* establish *a mere form* of words with so much weight, though the Judges were clearly of opinion, that "they *begun* against law, reason, and common sense," and that "there was not a colour, *originally*, to hold these words to be necessary," and where the penalty is so far inferior—how much more ought *they* to be regarded, and how religiously ought the *express* injunctions of a LAW wisely and benevolently intended to guard against loose proceedings, to be revered, when those proceedings are to consign a fellow citizen to *death?*

So "critical" have the Judges in *England* been *with respect to outlawries*, those vindictive supplements to a severe code of criminal jurisprudence (*f*), that the use of figures to denote time, as in

(*d*) "*Alder* was outlawed for murder—The sheriff returned—"at my county Court held at D in the county of *Northumberland*," and *did not say* "at my county Court *of Northumberland* held, &c." and this was holden to be error. 2 *Roll*'s Rep 52, cited by Lord *Mansfield*, with several other cases of the like purport, in *Wilkes*'s case.

"If an outlawry be returned, that the party was exacted (called) at *three* several times in the *tenth* year of *James*, and that he was a *fourth* time exacted the fifth day of *February* and did not appear, without mentioning any year, and was a *fifth* time exacted such a day in *March* in the *tenth* year of *James*, although it may be *intended*, that he was the *fourth* time exacted in the *tenth* year of *James*, yet the outlawry shall not be good *by intendment*." 2 *Roll*'s Abr. 803. 2 *Hale*'s P. C. 203. If any *intendment* or *implication* could support an outlawry, *this* seems to have been sufficient.

(*e*) 4 *Burr*. 2563, &c.

(*f*) "Either from a want of attention to these principles (of truth and justice, the feelings of humanity, and the indelible rights of mankind) in the first concoction of the laws, and adopting in their stead the impetuous dictates of *avarice*, *ambition*, and *revenge*; from retaining discordant political regulation, which successive conquerors or *factions* have estaalished in the various resolutions of government, &c." 4 *Blackstone* 3.

the return in the present case, or the addition or omission of a *single letter*, as in this return the writing "*Doane*" for "*Doan*," has been held a good objection for reversal (*g*).

Fourth—It appears very doubtful also, whether the issuing a warrant for the execution of *Aaron Doan*, would be a regular procedure, for the following considerations, 1st, Because, there never has been "an instance in *Pennsylvania* of a person being executed upon outlawry *by judicial proceedings alone*," though the "Act for the advancement of justice, &c." was passed near seventy years ago. 2d, Because, not only would such a prosecution to death be more sanguinary, than the law then was in *England*, but would also oppose that mild system, which the constitution of this Commonwealth has adopted. 3d, Because, it would weaken that *security*, which the constitution appears to have intended for its citizens; it being a dangerous mode of proceeding, that if admitted, ought to be regulated by the exactest cautions; as a precedent of this kind established in times of tranquility, may become a very destructive engine of policy in times less peaceable. 4th, Because, it seems to be unnecessary, the penalty—"forfeiture of lands and tenements, goods and chattels," *expressed* in the act, appearing to be a sufficient punishment, where guilt is not proved in the usual manner. 5th, Because, the "Act for the advancement of justice, &c." is *too obscurely* worded.

That act, in preceding parts, enumerates many *capital* offences, and some *not capital* though very heinous, *in every case* of both kinds mentioning the punishments to be respectively inflicted on the criminals, the modes of *trial*, and *the judgments* to be given.

It then goes on, in the seventeenth section, to proceedings of outlawry, with much inaccuracy of expression and confusion of meaning.

The words are not, as the honourable Judges have stated, that "the party indicted of a *capital offence*, not yielding his body to the Sheriff, shall be outlawed and attainted, &c." but, that "any person indicted or appealed for *any of the said crimes*, &c. without any distinction between offences "*capital*" or *not capital*.

Afterwards, in directing the proclamations, *a new* subject not before mentioned in the act is introduced into it, and the "person so indicted or appealed is to answer, &c. of the treason, felony, or TRESPASS, whereof he is so indicted or appealed."

This clause is immediately succeeded by another, that refers to *all* offences whether *capital*, *not capital*, or only *trespasses*, and makes the same provision in them all—"if he who is so indicted or appealed comes not at the said day of return of the said capias, and yield his body to the Sheriff, he shall be, by the Justices of the said Supreme Court, pronounced outlawed, and attainted of the crime whereof he is so indicted or appealed as aforesaid.

(*g*) *Style* 182. 334. *Cro. Eliz.* 204. *Cro Jac.* 576. 3 *Bac.* 767.

And from that time shall forfeit and lose all his lands and tenements, goods and chattels: *which forfeiture*, and ALL OTHER forfeitures expressed or implied by THE SAID JUDGMENTS, to be given UPON THE SAID CAPITAL OFFENCES MENTIONED IN THIS ACT, after SUCH criminals just debts and reasonable charges of their maintenance *in prison*, are deducted shall go, one half to the governor for the time being, towards support of this government, and for defraying the charges of prosecution, TRIAL and EXECUTION of SUCH criminals; and the other half or residue thereof shall go to SUCH criminals wife and children, &c."

Thus, the words "*which forfeiture*" refer to "TRESPASSES" as well as to "*capital offences*," and then, by a faulty connexion with the words "*other forfeitures*"—which "other forfeitures" rest on principles totally different, that is, on "TRIALS and JUDGMENTS before directed in the act, carry forward the confusion, until by grammatical construction the words "*which forfeiture*" are made to relate to the word "*execution*" in cases *not capital*, and even in cases of "*trespass*," which indubitably was never intended by the Legislature.

The words of the act just cited, and which seem to have had an influence on the honourable Judges, to wit, "UPON THE SAID CAPITAL OFFENCES MENTIONED IN THIS ACT," plainly refer to the "OTHER *forfeitures* and *judgments*," which had been prescribed and directed in parts of the act prior to that, which treats of outlawry.

Indeed, the honourable Judges, for sustaining a construction, that couples the word "*execution*" with the punishment of *outlaws*, seem to have relied on an "*implication*," to them appearing "most necessary, evident, and strong," but, still an "*implication*."

This distinction claims attention. The "*other* forfeitures" mentioned in the act *depend on* "*the offences being capital:*" the forfeiture *on outlawry does not.*

Lastly, The act by giving no direction on the point, leaves involved in great obscurity the question—*in what county* the party is to be *executed*, when the offence is charged to be committed, the indictment is found, and the proclamations are made in *one* county, and he is outlawed and attainted in *another*—which is the present case.

Law Books,

PRINTED BY, AND FOR,

P. Byrne,

AT HIS LAW AND MISCELLANEOUS BOOK STORES,

IN

Philadelphia and Baltimore,

	D.	C.
Durnford and East's Reports, 8 vols.—Any volume may be had separate,	42	
East's Report's—Being a new Series and Continuation of Durnford and East's Reports, 4 vols. the 5th is in the press, and will speedily be published,	20	
Vesey (Junior's) Reports in Chancery, beginning Hilary Term 29 George 3d, 1789, ending 41 George 3d, 1801, inclusive, in 5 vols. the 6th in the press,	25	
Cowper's Reports,	4	50
Douglas's Reports, 2 vols.	6	
Espenasse's Reports, 3 vols.	9	
Blackstone's (Henry) Reports, 2 vols.	9	
——'s (William) Commentaries, with Burr, Williams, and Christians Notes, 4 vols.	6	
The Notes to Blackstone's may be had separate, which complete all the former editions of that work,	1	50
Lord Chief Justice Willes's Reports in the Courts of Common Pleas during the time he presided there, 1737 to 1758, in which are given Notes of Cases taken by Mr. Justice Fortescue and Mr. Justice Abney; both of whom were Justices in the same Courts. These are given as Notes to Justice Willes's Reports. This volume contains Reports of three Judges,	4	50
Burn's Law Dictionary,	3	50
——'s Justice, 4 vols.	8	
Ambler's Reports,	3	25
Anstruther's do.	3	25
Andrew's do.	3	
Attorney's Pocket Book, 3 vols. bound in 2,	2	
Attorney's Vade Mecum, 2 vols.	5	
Barton's Historical Treatise on a Suit in Equity,	1	50

	D.	C.
Equity Pleader's Assistant, containing a variety of precedents of Bills, Answers, Pleas, Replications, Demurrers, Decrees, and Interrogatories, methodically arranged with readings and observations, 2 vols.	5	
Equity Cases abridged, 3 vols.	9	
Bacon's Abridgment, 7 vols.	37	
Supplement to do. 2 vols. which complete all editions in 5 vols beginnings vols. 6 & 7.	12	
Comyn's Digest, 6 vols.	19	
———'s Reports,	4	
Burrow's Reports, 5 vols.	20	
Reeves's English Law, 4 vols.	8	
———'s Law of Shipping,	2	
Crokes's Reports, 3 vols.	12	
Raymond's do. 3 vols.	9	
Howard's Practice in Courts of Common Pleas and Exchequer, 4 vols. bound in two,	5	
Peake's Cases, determined at Nisi Prius,	2	
Powell on Contracts,	2	25
——— on Powers,	2	25
——— on Devises,	2	25
——— on Mortgages,	2	25
Wood's Complete System of Conveyancing, 6 vols.	21	
Newman's do. 6 vols.	21	
Williams's do. 2 vols.	5	
Brown's Chancery Cases, 4 vols.	16	
Bankrupt Laws,	2	
Barnes's Notes,	2	
Bunbury's Reports,	2	
Baily on Bills of Exchange,	1	
Coke's Littleton, folio.	18	
Crampton's Practice,	4	
Commercial Reports,	1	75
Costs in Chancery,	1	75
Colles's Reports,	3	
Collectanæ Juridica,	2	
Digest of Durnford and East's Reports by Tomlins,	3	
Davis's Reports,	2	
Dyer's do. 3 vols.	9	
Delolme on Constitution of England,	1	75
Dalrymple on Property,	1	50
Dogherty's Crown Circuit Companion,	2	
Espinasse's Digest, 2 vols.	6	
Eunomius	2	25
Every Man his own Lawyer,	2	25
Fearz on Remainders, 2 vols.	4	
Forster's Crown Law,	2	
Fonblanque on Equity, 2 vols.	5	
Finch's Chancery,	2	50

	D.	C.
Gilbert's Evidence, 2 vols.	8	
———'s Equity,	2	
———'s Tenures,	1	50
———'s Replevins,	1	75
Doctor and Student,	2	
Hale's Pleas of Crown, 2 vols.	6	
Hawkin's do. 2 vols.	7	
Hargrave's Law Tracts,	3	
———'s State Trials, 3 vols.	21	
Hatsell's Precedents, 3 vols.	5	
Hullock's Law of Costs,	3	
Hardy's Reports,	2	
Heywoods Digests,	2	
Hale's Common Law,	2	50
Hynde's Chancery,	2	
Impey's Modern Pleaders,	2	
Jones on Bailments,	2	
Hydd, Baily, and Loveless, on Bills of Exchange,	2	50
Leache's Crown Law,	2	50
Landlord and Tenant,	1	
Law Grammar,	2	25
Loveless on Wills,	2	
Lilly's Entries, 2 vols.	5	
Levinze's Reports, 2 vols.	5	
Loft's Reports,	4	
Montesquieu's Spirit of Law, 2 vols.	3	
Morgan's Law of Evidence, 3 vols.	5	
Modern Reports, 12 vols.	31	
Mosely's Reports,	2	
Mallery's Entries, 2 vols.	8	
Nature's Brevium,	3	
Practor's Practice,	2	
Noy's Maxims,	1	
Plowden's Reports, 2 vols.	7	
Points in Law and Equity,	1	
Perkin's Conveyancing,	1	
Pleader's Assistant,	2	
Pigott on Recoveries,	1	50
Park on Insurance,	2	
Ridgeway's Reports,	3	
Runnington on Ejectment,	2	
Rupertorium Juridcum,	5	
Roper on Legacies,	2	

☞ *BYRNE is constantly supplied with a very general assortment of old and new LAW BOOKS, which he intends to increase by importations from London and Dublin. Any orders he may receive at either of his Stores, shall have due attention paid them.*